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Case No: QB-2014-004925-26
QB-2015-005378

IN THE HIGH COURT OF JUSTICE
QUEEN'S BENCH DIVISION
MEDIA AND COMMUNICATIONS LIST

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 1 July 2021

Before :

THE HONOURABLE MR JUSTICE NICKLIN

- -

Between :

Bruno Lachaux	**Claimant**
- and -	
(1) Independent Print Limited **(2) Evening Standard Limited**	**Defendants**

- -
- -

Adrienne Page QC and Godwin Busuttil (instructed by **Taylor Hampton Solicitors Ltd**)
for the **Claimant**
David Price QC and Jonathan Price (instructed by **David Price Solicitors**)
for the **Defendants**

Hearing dates: 22-24 February and 1 March 2021

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Approved Judgment

I direct that no official shorthand note shall be taken of this Judgment and that copies of this version as handed down may be treated as authentic.

THE HONOURABLE MR JUSTICE NICKLIN

The Honourable Mr Justice Nicklin :

1. This is the judgment following the trial of the Claimant's claims for libel against the two publishers of newspaper articles published in January-February 2014. It is divided into the following sections:

A: The Claimant

2. The Claimant is a French citizen. He is an aerospace engineer, who graduated from the University of Paul Sabatier in Toulouse with a degree in Aerospace Mechanical Systems Design. He is also a Master of Sciences in Aerospace Design. The Claimant has spent a professional career in the aerospace industry and is a teacher and instructor at the Khalifa air military college in Abu Dhabi and presently lives in the United Arab Emirates.

3. He met Afsana Shukur ("Afsana"), a British citizen, in New Delhi in February 2008. They married in London in February 2010 and their child, Louis, was born in Dubai on 4 April 2010. The marriage broke down, and, in April 2011, the Claimant began divorce proceedings in the UAE courts. He sought custody of Louis. In March 2012, Afsana went into hiding with Louis in the UAE, claiming that she would not get a fair trial in its courts. In August 2012, the UAE court granted a divorce to the Clamant and awarded him custody of Louis. Afsana did not comply with the Court's custody order, and, in February 2013, the Claimant initiated a criminal prosecution against her for abduction of Louis. In October of that year, having discovered Louis' whereabouts, the Claimant took possession of him under the custody order. The breakdown in the relationship and the court proceedings in the UAE provide the immediate context for the articles at the heart of this libel action.

B: The Defendants

4. At the relevant time, the First Defendant published *The Independent* and had a sister publication, the *i* newspaper. *The Independent* is, and was then, published online at www.independent.co.uk. At that time, Alastair Dawber, Andrew Johnson and Christopher Green were, respectively, the Foreign Editor, Assistant News Editor and Deputy News Editor of *The Independent*. The News Editor at the time was Matthew Moore and the Editor was Amol Rajan.

5. The Second Defendant publishes the *Evening Standard* newspaper, in print and online at www.standard.co.uk. At the relevant time, Charlotte Ross was the Joint Deputy

Editor and Susannah Butter was a feature writer at the *Evening Standard*. Sarah Sands was the Editor of the newspaper.

C: Publication of the Articles and their natural and ordinary meaning

6. The first article was published by the First Defendant in *The Independent*, on 25 January 2014, under the headline: "*British mother faces jail in Dubai after husband claims she kidnapped their son*" ("the Independent Article"). The Independent Article, which appeared across two pages of the newspaper, was written by Alastair Sloan, a freelance journalist. An abbreviated version of the Independent Article was also published by the First Defendant in the *i* newspaper.

7. There followed, on 10 February 2014, an article, written by Susannah Butter, published by the Second Defendant, in the *Evening Standard*, under the headline: "*Dubai's a small place – he took Louis in an instant*" ("the Standard Article").

8. Both articles were published online from the date of first publication. They have remained online since, although they have been amended several times since publication. The text of the two articles – as originally published – is set out in Appendix 1 to this judgment.

9. The Claimant brought separate claims against each Defendant in respect of the respective articles, but the actions have progressed in tandem through the interim phases of the litigation and have been tried together. The Claimant also brought a further claim over articles that appeared in the *Huffington Post* at around the same time, but this claim was settled (see further [213] below).

10. The parties had agreed the publication figures in England & Wales for print editions of the relevant newspapers as follows:

    i) the Independent Article: between 154,370 and 231,555 readers of *The Independent* and between 523,518 and 785,277 readers of the *i* newspaper; and

    ii) the Standard Article: between 1.67-2.5 million readers.

11. For online publication of the articles:

    i) between first publication and 12 June 2015, 5,178 unique visitors from the UK to the Independent Article; and

    ii) between first publication and 15 June 2015, 1,585 unique visitors from the UK to the Standard Article

12. Updated traffic data was provided by the Defendants in July 2020 as follows:

    i) in the period between June 2015 and February 2017, the Independent Article had 274 unique visitors and the Standard Article had 245 unique visitors; and

    ii) in the period between March 2017 and April 2020, the Independent Article had 405 unique visitors, of which 200 were from the UK, and the Standard Article had 263 visitors, of which 180 were from the UK.

13. Sir David Eady determined the natural and ordinary meaning of the articles following a trial of preliminary issues on 11 March 2015: [2015] EWHC 620 (QB) [40]-[41].

(1) The Judge found that the meaning of the Independent Article was that the Claimant:

"(i) became violent towards his ex-wife Afsana soon after the birth of their son, which caused her, fearing for her safety, to escape and go on the run with the child;

(ii) having tracked Afsana down, callously and without justification snatched their son back from his mother's arms (and has never returned him);

(iii) falsely accused Afsana of kidnapping their son, a false charge which if upheld could result in her, quite unfairly and wrongly, spending several years in a Dubai jail;

(iv) was content to use Emirati law and its law enforcement system, which discriminate against women, in order to deprive Afsana of custody of and access to their son Louis;

(v) hid the child's French passport and refused to allow him to be registered as a British citizen, as Afsana wished;

(vi) was violent, abusive and controlling and caused Afsana to fear for her own safety;

(vii) caused her passport to be confiscated thus for her to be trapped in the UAE; and

(viii) obtained custody on a false basis and also initiated a prosecution of Afsana in the UAE, which was founded upon a false allegation of abduction, and which gave rise to the risk of a lengthy prison sentence there."

It is common ground that this is also the meaning of the *i* article.

(2) The meaning of the Standard Article was found to be that the Claimant:

"(i) became violent and abusive towards his ex-wife Afsana within months of marrying her, beating her and leaving her with bruises on at least one occasion;

(ii) assaulted Afsana in public on custody visits relating to their young son;

(iii) attempted to snatch their son on one custody visit, leaving him with a badly bruised head;

(iv) callously and without justification snatched their son from out of his pushchair in the street (and has never returned him);

(v) subjected Afsana to the injustice of facing jail in Dubai for 'abducting' her own child, when in truth she had only fled with him to escape the Claimant's violent abuse;

(vi) having chosen to obtain a divorce in a Sharia court, also used Emirati law and its law enforcement system, which discriminate against women, in order to deprive Afsana of custody of and access to their son Louis;

(vii) hid the child's French passport and refused to allow him to be registered as a British citizen, as Afsana wished;

(viii) was violent, abusive and controlling and caused Afsana to fear for her own safety;

(ix) caused her passport to be confiscated thus for her to be trapped in the UAE;

(x) threatened to report Rabbhi and Shabbir Yahiya to the police for aiding a kidnap if they came to Dubai;

(xi) caused Afsana to go on the run with Louis; and

(xii) obtained custody on a false basis and also initiated a prosecution of Afsana in the UAE, which was founded upon a false allegation of abduction, and which gave rise to the risk of a lengthy prison sentence there."

D: The Defendants' Defence

14. It their original Defences – filed on 23 January 2015 – as well as denying that the publication of the articles had caused serious harm to the Claimant's reputation, both Defendants relied upon substantive defences of truth and public interest under ss. 2 and 4 Defamation Act 2013.

15. Amended Defences were filed on 13 December 2017 withdrawing the defences of truth in both claims. It is a reasonable inference that the decision to abandon reliance upon the defence of truth was based, at least in part, upon a decision in family proceedings between Afsana and the Claimant which led to a judgment of Mostyn J on 2 March 2017 (see [86]-[90] below).

16. Re-Amended Defences, withdrawing reliance upon s.4(3) Defamation Act 2013, were filed on 12 November 2020 (see [125] below). s.4(3) is the statutory embodiment of what had become known, under the *Reynolds* common law defence, as 'neutral reportage': see ***Flood -v- Times Newspapers Ltd*** **[2012] 2 AC 273** [77]-[79] *per* Lord Phillips (quoted in [138] below).

17. At the trial, therefore, the only substantive defence relied upon by the Defendants was a defence of public interest under s.4.

E: Determination of Serious Harm

18. The issue of serious harm was also resolved prior to trial following the trial of a preliminary issue. Indeed, as a result of interim appeals in this case, ultimately to the Supreme Court, Mr Lachaux's name is likely always be associated with the interpretation of s.1 Defamation Act 2013 and its requirement that, in a defamation claim, a claimant must show that a published statement has caused (or is likely to cause) serious harm to reputation.

19. On 30 July 2015, Warby J handed down judgment following the trial of several preliminary issues including reference and serious harm ([2016] QB 402). The Judge found that the articles referred to the Claimant and that the Claimant had satisfied the requirements of s.1. The Independent and Standard Articles both contained "*grave allegations [that were] very widely published*" and each article had each caused serious harm to the Claimant's reputation: [148]-[150], [153]. The Defendants' appeal against the decision on serious harm was dismissed by the Court of Appeal on 12 September 2017 ([2018] QB 594), and by the Supreme Court on 12 June 2019 ([2020] AC 612).

F: The facts and the witnesses

20. In this section of the judgment, I shall deal with the relevant Codes of Practice/Conduct; the facts that led up to the publication of the two articles; the subsequent family proceedings in the High Court between the Claimant and Afsana; amendments made to the online publication of the articles; and the paucity of contemporaneous documentation and the fading memories of the witnesses. The facts are largely uncontentious. To the extent that there was any dispute, my conclusions as to fact are set out in this section of the judgment.

21. Before doing so, I should set out some general observations about the witnesses. The Defendants did not require the Claimant to be cross-examined. Two witness statements of his, his first, dated 7 July 2015, and his fourth, dated 14 July 2020, stood as his examination in chief. As is often the case, where the substantive defence is a defence of public interest under s.4, the nature of the defence, and the issues to be determined, means that the claimant can give little or no evidence relevant to the defence.

22. The First Defendant relied upon the evidence of Alistair Dawber, Andrew Johnson, Alastair Sloan, and Christopher Green. The Second Defendant relied upon the evidence of Charlotte Ross and Susannah Butter. Both Defendants relied upon the evidence of William Gore. Each of the Defendants' witnesses was cross-examined. I am satisfied that each witness was honest and did his/her best to assist the Court. Unsurprisingly, most of the witnesses could recall little, if anything, about the events that had taken place over 7 years ago. This has had an impact on the Defendants' ability to demonstrate aspects of their public interest defence.

(1) Relevant Codes of Practice/Conduct

23. At the time of publication of the articles the relevant titles were members of the Press Complaints Commission ("PCC"). The PCC's Editors Code of Practice, in force at the time, included the following preamble:

> "All members of the press have a duty to maintain the highest professional standards. The Code, which includes this preamble and the public interest exceptions below, sets the benchmark for those ethical standards, protecting both the rights of the individual and the public's right to know. It is the cornerstone of the system of self-regulation to which the industry has made a binding commitment.
>
> It is essential that an agreed code be honoured not only to the letter but in the full spirit. It should not be interpreted so narrowly as to compromise its commitment to respect the rights of the individual, nor so broadly that it constitutes an unnecessary interference with freedom of expression or prevents publication in the public interest.
>
> It is the responsibility of editors and publishers to apply the Code to the editorial material in both printed and online versions of publications. They should take care to ensure it is observed rigorously by all editorial staff and external contributors, including non-journalists, in printed and online versions of publications."

24. The Code was divided into the following Clauses: (1) Accuracy, (2) Opportunity to reply, (3) Privacy, (4) Harassment, (5) Intrusion into grief or shock, (6) Children, (7) Children in sex cases, (8) Hospitals, (9) Reporting of crime, (10) Clandestine devices and subterfuge, (11) Victims of sexual assault, (12) Discrimination, (13) Financial journalism, (14) Confidential sources, (15) Witness payments in criminal trials, and (16) Payment to criminals. The Code had an overarching section on the public interest which provided:

> "There may be exceptions to [Clauses (3), (4), (6), (7), (8), (9) and (16)] where they can be demonstrated to be in the public interest.
>
> 1. The public interest includes, but is not confined to:
>
> (i) Detecting or exposing crime or serious impropriety.
>
> (ii) Protecting public health and safety.
>
> (iii) Preventing the public from being misled by an action or statement of an individual or organisation.
>
> 2. There is a public interest in freedom of expression itself.
>
> 3. Whenever the public interest is invoked, the PCC will require editors to demonstrate fully that they reasonably believed that publication, or journalistic activity undertaken with a view to publication, would be in the public interest and how, and with whom, that was established at the time.
>
> 4. The PCC will consider the extent to which the material is already in the public domain, or will become so.
>
> 5. In cases involving children under 16, editors must demonstrate an exceptional public interest to over-ride the normally paramount interest of the child."

25. Although not relevant to the issues I must decide, I would note that the current Code of Practice of the Independent Press Standards Organisation ("IPSO") contains similar

provisions in respect of demonstrating the public interest. The equivalent provision of paragraph 3 of the public interest clause now provides:

> "Editors invoking the public interest will need to demonstrate that they reasonably believed publication - or journalistic activity taken with a view to publication – would both serve, and be proportionate to, the public interest and explain how they reached that decision at the time."

The current Standards Code of the Independent Monitor for the Press ("IMPRESS") provides the following in relation to the public interest:

> "The following provisions apply where a publisher is about to undertake an action that they think would otherwise breach the Code, but for which they believe they have a public interest justification. The action might be a particular method of newsgathering or publication of an item of content. Before undertaking the action, the publisher should, where practicable, make a contemporaneous note, which establishes why they believe that:
>
> i) The action is in the public interest;
>
> ii) They could not have achieved the same result using measures that are compliant with the Code;
>
> iii) The action is likely to achieve the desired outcome; and
>
> iv) Any likely harm caused by the action does not outweigh the public interest in the action.

IMPRESS provides the following guidance in relation to making a "*contemporaneous note*":

> "**Contemporaneous note**
>
> The recommendation that journalists maintain a contemporaneous note, or audit trail, of their activities or publication of a news story is not a strict requirement, but is good practice. Such an audit trail may, for instance, identify who gave permission for the action taken, and what discussion there was of the justification for it. This assists journalists in accurately recording the public interest rationale for behaviour that may be contrary to the Code. It also encourages journalists to think carefully at the time about why and whether a given action is justified in the public interest.
>
> The Code recommends that where a publisher believes there is a public interest justification for an action, or for the publication of a news story that would otherwise breach the Code, they should make a contemporaneous note explaining the justification. The Code provides a list of factors that should be in the note…
>
> 'Contemporaneous' should not be read strictly as meaning that a note must be written simultaneously to the journalistic activity. It means that a note should be made as soon as is physically practicable after an event or interview. This note may take the form of a private note, diary entry or an email to a colleague or editor. It may be a brief paragraph, or longer, depending on the circumstances. The date on which the note was made should be clear.

> A failure to make a contemporaneous note is not in itself something that could form a complaint against a publication. However, such a failure will make it harder for a publisher to substantiate any public interest justification in response to an alleged breach of the Code."

26. In addition to the PCC Code of Practice, both Defendants had adopted a single "*Code of Conduct and Complaints*" ("the Defendants' Code").

    i) In its introduction, the Defendants' Code provided:

> "It is important that we get things right. Our commitment to high standards is embodied in our company Code of Conduct, which is set out in full below. This Code applies to all members of our editorial staff, as well as freelancers who work for us, and our business partners.
>
> Adherence to our in-house Code requires that our journalists also abide by the terms of the industry-wide Code of Practice, which is overseen by the Press Complaints Commission…
>
> This Code provides clear standards on the levels of behaviour and conduct which should underpin how we work. It applies to all board members, employees, temporary or shift workers, contractors, agents, consultants and people acting for on or behalf of the Company. All editorial contributors, whether contracted or freelance, are expected to comply with our approach as set out in this Code, and their particular attention should be given to the Editorial Provisions below…
>
> While managers should ensure this Code is understood within their own areas, everyone takes personal responsibility for their own compliance.
>
> It is impossible to spell out every ethical scenario that could arise so you need to use your good judgment to uphold the expected high standard of integrity at all times. It is important to abide not only by the letter but also the spirit of this Code."

    ii) The Defendants' Code contained a section headed "Editorial Provisions" which contained the following introduction:

> "As stated earlier, the reputation of our brands is based on the editorial independence, integrity and high journalistic standards of our newspapers and online publications. By observing this section of the Code of Conduct, we will ensure that those standards are upheld…
>
> In addition to the Code, you must adhere to the Press Complaints Commission's Editorial Code of Practice (the 'PCC Code')… You should keep updated on all developments of the Code and its application. As part of your employment contract/retainer arrangements/freelance terms, you are obliged to comply with both the letter and the spirit of the PCC Code in your work for the Company and to ensure that nothing in your conduct, acts or omissions shall render the Company in breach of the PCC Code…"

    iii) The "Editorial Provisions" section was divided into three "Stages", the important one of which, for present purposes, was the pre-publication stage:

> "**STAGE 1 – PREPARING FOR PUBLICATION**
>
> **Pre-publication editorial and legal clearance**
>
> You must fully cooperate with the editors in the area you are working in or for, and undertake whatever prepublication checks and research are requested by those editors or the legal department.
>
> If you have any legal concerns, whether over libel, contempt, privacy, copyright or other issues, or ethical concerns about a story or article, it is up to you to consult the legal department (available to all employees, workers and freelances across both businesses [email address given]) as early on in the process as possible. The legal department will work with you to ensure that any material published is accurate, defensible, and does not unjustifiably breach any person's rights, while being compliant with the PCC Code. Legal claims can be hugely expensive to the Company as well as damaging to its reputation. To be in the best position to defend a claim or complaint it is important that the people involved in preparation and publication of the story ensure their pre-publication conduct is beyond reproach, use their best efforts to get all the facts right, do the necessary research and seek a response from the subject of an article.
>
> Each of you carries personal responsibility for asking the legal department about any specific issues you are not sure about, for updating yourself regularly with all information provided on legal and compliance subjects, and for familiarising yourself with legal bulletins and notices sent out by the legal department or by the managing editors.
>
> It is your duty to raise, in a full and frank manner and making full disclosure, any issues that could have a bearing on whether publication of any material you are involved in complies with all legal and regulatory matters, including the PCC Code, as well as any issues to do with conduct."

iv) There was then a section under the heading: "*Putting the story to the subject*":

> "It is good journalistic practice that any potentially damaging story is put to the subject before publication. This is a key factor in our commitment to good and responsible journalism. It ensures that the subject has been given the opportunity to point out any errors in a story as well as providing their response to it so that it can be included in the article in the interests of fairness. The more serious the allegation, the more important it is to provide the subject with a proper opportunity to respond. This should normally be done by an emailed request, setting out each allegation and giving the subject a reasonable amount of time to consider the allegations and to respond.
>
> Any queries on this point should be raised with the desk head concerned and the legal department."

v) In relation to notebooks and records, the Defendants' Code provided:

> "Detailed notes and contemporaneous records of conversations with a source could be crucial in defending a potentially libellous story, so you should take such notes and make sure you preserve them securely, bearing in mind that

> you may have to produce them as evidence in court. If a source needs to remain confidential you need to ensure that they cannot be identified in any way in your notes or other material.
>
> If a legal complaint is received, you are under a personal legal obligation to retain safely all your records including notes and audio-recordings. Any attempt at this point to destroy or get rid of evidence, or a failure to conserve this material, would be considered a very serious matter by the Company and by the court."

vi) Under a hearing "*PCC Code Compliance*", the Defendants' Code provided:

> "As stated above, you must adhere to the PCC Code. Every clause is important, and to demonstrate its scope we draw your attention to provisions relating to privacy, children, grief and suicide (clauses 3, 6 and 5 respectively)."

vii) Finally, under the hearing "*Use of freelances and the necessary due diligence procedures*" the Defendants' Code provided:

> "When an employee is commissioning any freelances, they should research that person's professional history to ensure they are reliable, trustworthy and that their record on the standards of work and conduct is suitable for an association with the Company. If you are in any doubt, refer the issue to your desk head and the managing editor for assessment. Any freelance you intend to use should be directed to this Code of Conduct and to the Terms for Freelance Contributions which are available on the Company's websites and will also be sent to them."

27. The Defendants' Code was made available, publicly, on the websites of the relevant titles. Reference to it was also included in print editions of the newspapers.

28. Ms Page QC cross-examined Mr Gore about the requirement, included in the Defendants' Code (see [25(iv)] above), to put any allegations to any individual that would potentially be damaged by publication of an article. Mr Gore accepted that this was generally how this part of the Defendants' Code was read, but he drew attention to the paragraph that followed – the suggestion that queries should be raised with the "desk head" and legal department – and stated that there may be occasions where there would need to be discussion "*about any element of this section potentially not [being] invoked*". Generally, however, he accepted, "*if the subject of a story was likely to be seriously damaged by an article, then it might well be appropriate to put the matter to the subject*".

29. The footer on Mr Green's emails contained a link to the Defendants' Code under the text: "*These are our terms and conditions for freelance contributors and our code of conduct*". When cross-examined, Mr Green could not recall who was responsible for ensuring the freelance journalists adhered to the Defendants' Code and he could not recall having a specific discussion with any freelance journalist about it. Mr Gore believed that an instruction had been given to all staff that a link to the Defendants' Code should be included in email footers. Ms Page QC pointed out that no such link appeared in Mr Johnson's emails. Mr Gore did not know why it was missing.

(2) Publication of the Independent Article

30. In January 2014, Alastair Sloan was working as a freelance journalist. He was 27 and specialised in human rights issues. At the time, he was researching, and writing about, the human rights situation in the Gulf states and the British government's relationship with those states.

31. In January 2014, Alistair Dawber was the foreign editor of *The Independent.* By email, on 21 January 2014, Mr Sloan pitched a story to Mr Dawber (with paragraph numbers added but underlining in the original):

> "Hi Alistair,
>
> Hope you are well. Another UAE pitch for you, do let me know your thoughts?
>
> [1] A British citizen faces an 'unfair trial' and years in a Dubai prison, after her violent ex-husband falsely accused her of kidnapping her own son, say human rights groups.
>
> [2] She has been beaten by Dubai police, harrassed (sic) and prevented from returning to UK. She was made homeless with her three year old son.
>
> [3] The family have also spoken out over the behaviour of the Foreign Office, whose behaviour they describe as "disgusting."
>
> [4] The womans (sic) husband, a French businessman residing in Dubai, started beating her shortly after they married in 2011. Afsana Lachaux, a British citizen from London, aged 43, had just given birth to their child, who she fled with after it became unsafe for her to live with the husband. They later divorced.
>
> [5] But under Dubai laws he was able to place a travel ban on her and prevent her from working - meaning that she became homeless and had to take shelter in a womans' (sic) refuge run by a local charity.
>
> [6] Afsana and her son have lived in poverty since then, unable to work and unable to return to the UK. They have been reliant on the support that her elder, recently graduated sons can provide. This ordeal has financially ruined her entire family and they struggle to make ends meet.
>
> [7] On one occassion (sic) she was put in prison with her son, who was denied food and water, and she was violently assaulted by prison guard, says human rights group Emirates Centre for Human Rights.
>
> [8] In October 2013, her ex-husband found her at Jumeirah Beach hotel and violently grabbed the three year old - who has not been seen since. He then reported her to police and she faces a kidnapping trial - which Emirates Centre for Human Rights say 'She will never face a fair trial in the UAE. The UAE legal system is prejudicial to women and widely criticised by democratic nations.'
>
> [9] Human Rights Watch and Amnesty approached for quotes, they will back up all above and are aware of the case. Quotes coming back tomorrow.

> [10] I'm going to Skype the mother tomorrow.
>
> [11] Quote coming from her MP and FCO spokesperson, family are also sending me what they found out about her ex-husband from US, he had a restraining order after he beat up ex-girlfriend.
>
> [12] V Strong quotes from family - who are happy to go on record as 'disgusted' with FCO.
>
> [13] 'Quite disgusted with the way they have handled it. As a British family, we're very upset that they haven't intervened. They could have done more.'
>
> [14] 'Correspondence sent to Alistair Burt, Hugh Robertson and William Hague was not even replied to. They've all been to UAE to sell fighter jets but haven't raised our case once with the authorities.'
>
> [15] 'The responses we received from the Foreign Office officials were insulting.'
>
> Let me know your thoughts?"

32. In his evidence, Mr Dawber explained that the story fell under the remit of 'home news', being one that involved issues confronted by a British Citizen whilst abroad. He could not remember, when he gave evidence at the trial, whether he had previously been pitched stories by Mr Sloan. Mr Dawber forwarded the email to Mr Moore and Mr Green. Mr Green was the Deputy News Editor, a post he had held at the time for some 2½ years. He responded to Mr Dawber, at 12.34, "*Looks like a decen[t] yarn – HuffPo ran this yesterday*". He posted into his email the text of the *Huffington Post* article. Mr Green explained in his evidence that his comment was "*news desk parlance for conveying that it looks interesting and is worthy of further investigation*".

33. At 13.08, Mr Green emailed Mr Moore: "*Looks like this guy [Mr Sloan] isn't getting most of the info on this until tomorrow, so will contact him now and maybe list Weds4Thurs if it stacks up.*" Mr Green explained this meant the earliest an article could appear on the news list would be on Wednesday for a possible publication on Thursday. He did not accept that this meant that publication was imminent; "*in a newsdesk situation, two days later is not imminent.*" He said that, by "*stacks up*", he meant that what had been promised in the pitch was fulfilled in the draft article and it passed the usual checks made prior to publication.

34. Mr Green said that he could not recall carrying out any investigation into Mr Sloan's previous work or any 'due diligence' on him. He did not think that, had he done so, he would have made any record of it: "*it would have been more something I would have done on my computer and then satisfied myself that way and moved on from that*". For his part, Mr Johnson's evidence was that it would have been Mr Green's responsibility to do research on Mr Sloan and his experience but he "*wouldn't start questioning [his] senior about a freelance commission*". Mr Sloan did not recall being asked any questions about his prior experience or articles he had published previously. There are no documents suggesting that he was. He thought that he had unsuccessfully pitched an article once before to Mr Dawber. Mr Sloan was not aware of the Defendants' Code and no-one at the First Defendant had brought it to his attention. He did not follow the link in the footer of Mr Green's email (see [29] above).

35. At 13.54, Mr Green emailed Mr Sloan:

> "… Sounds like a very interesting and shocking case. We'd certainly be interested in a news story – would it work to do it tomorrow for Thursday's paper? That seems to work best as it'll give you time to get all the quotes and other material together. When is the trial due to start do you know? And are their (sic) pictures available of her and her son?..."

36. It is clear, from an email sent on 22 January 2014, that Mr Sloan and Mr Green had spoken during the evening of 21 January 2014. Mr Green could not recall what was discussed, and no note of the conversation is available. He had no recollection of whether he had asked Mr Sloan to put the allegations made by Afsana to the Claimant for comment. Ms Page QC asked Mr Green whether he had been asked to check whether he had any notes. Mr Green said he had not, but he explained that, when he was working on the newsdesk, most communication was by email or quick phone conversation. He had a pad on his desk, but he did not use it systematically to record information:

> "It would take me quite a long time to go through a pad and I don't remember preserving or making any sort of conscious decision to keep hold of them. I have no idea where they are now, so I presume I must have got rid of them at certain junctures, I guess."

37. On 23 January 2014, at 08.23, Mr Green emailed Mr Sloan's pitch to Mr Moore:

> "Herewith. Seems like a shocking tale – we have pics of her with her son. He's since got lots more quotes etc. Will get him to send draft over now."

In his email to Mr Moore, Mr Green had highlighted paragraphs [4] and [5] in the pitch, which contained the first reference to domestic violence by the Claimant. At the same time, he emailed Mr Sloan to request that he send over a draft article advising, "*We're hoping to do it in tomorrow's paper*". When cross-examined, Mr Green could not recall what he had considered "*shocking*" in Mr Sloan's pitch. He accepted that, in his pitch, Mr Sloan had given no indication of how he was intending to verify the allegations of domestic violence made by Afsana.

38. Mr Sloan emailed his first draft of the article to Mr Green at 10.09. Mr Green forwarded the email with the draft article – without comment – to Mr Moore at 10.34. Mr Sloan emailed a revised copy of the article at 11.51 commenting on the amendments: "*… the son has been in touch and says he wants the allegations to come from him, not his mother, as she is still facing charges in Dubai and doesn't want to jeopardise his case.*" Again, Mr Green forwarded this to Mr Moore at 11.55. In his evidence, Mr Green said that he had no specific recollection, but he would have wanted "*to keep Mr Moore in the loop*".

39. In his witness statement, Mr Green explained that the following day – 24 January 2014 – the article would have been on the news list in morning conference. The 'news list' identifies the articles that are candidates for publication in the following day's newspaper. Mr Green thought that, at that time, the morning conference took place at either 10am or 10.30am. It was attended by all heads of department; i.e. the foreign editor, news editor, arts editor, picture editor, etc. There would be discussion about the news list, and the stories on it, and the relevant editors would explain what they were about. Mr Green did occasionally attend the morning conference, but he could not recall

whether he had done so on 24 January 2014. No notes or records were kept as to what was discussed at the morning conference.

40. Following morning conference, at 11.09 Mr Green sent an email to the newsdesk: "*Can someone give this a once over and see if there are any gaping holes?*" Mr Green had no recollection of this email, but he thought that it was a general instruction to give the story "*another check and look over*" rather than raising any specific concern. He wanted someone to go through the article to see "*whether there were any errors, whether there was anything that didn't quite make sense, really just running a ruler over the whole thing*". Mr Johnson was the person at the newsdesk who took on this task.

41. In January 2014, Mr Johnson was acting in a freelance capacity as an assistant news editor. He was a seasoned journalist with 20 years' experience. Asked whether he kept a notebook, Mr Johnson confirmed that he kept a pad on which he jotted down phone numbers or things like that, but he was not in the habit of keeping notes relevant to particular stories. Ms Page QC asked him whether he had looked back at the pad that he had in January 2014. He said he had not and that he had not been asked to look for it.

42. Mr Johnson said that he understood Mr Green's request to give the article a "*once over*" was "*standard newsroom due diligence to ensure it is viewed by more than one person so that any difficulties or missing pieces are noticed.*" In cross-examination, Mr Johnson accepted that this due diligence process would extend to identifying issues in an article that might give rise to a complaint. He also accepted that the draft article, although it did not name the Claimant, did contain serious allegations against him.

43. At 11.50, Mr Johnson emailed Mr Sloan. Mr Johnson accepted that the email's greeting – "*Hi again*" – suggested that he and Mr Sloan had already communicated, but Mr Johnson could not remember any details. In his email, he said:

> "It seems to me the new stuff you've got is the claims by the son that she was abandoned by the British authorities. Can you re nose it along those lines, and do 800 words, including stuff we might not have from the other stories. It might be worth giving her MP Jim Fitzpatrick a ring and asking him if he thinks the consulate etc could have done more. He's quoted heavily at the end of the Mail piece from a statement he made in Parliament he made in December and we could definitely use that."

"*Re nosing*" means to rewrite the opening paragraph(s) of the article. As part of giving the article a "*once over*", Mr Johnson said that, as was his usual practice, he carried out a Google search and identified some earlier articles on the same topic, he thought he found articles in the *Daily Mail* and *Daily Telegraph.* Mr Johnson said that his email to Mr Sloan expressed his concern to avoid simply repeating a story that had already been published in other newspapers.

44. Mr Sloan responded to Mr Johnson, at 14.57. He sent a revised article and commented: "*See below, have angled it around lack of support from FCO*". Mr Johnson replied, at 14.59, raising a point that he had picked up. In the *Daily Mail* article he had found, the Claimant was described as an "*aviation engineer*". Mr Johnson told Mr Sloan: "*happy to go with French currency dealer if you're sure*". Mr Sloan subsequently

confirmed that he was sure that the Claimant was a currency dealer. Asked by Ms Page QC why this detail mattered, Mr Johnson said: "*because of accuracy…; you want to be as accurate as possible*".

45. At 15.33, Mr Johnson sent a further revised draft of the article to Mr Sloan for approval (with paragraph numbers added):

> "[1] The family of a British woman trapped in the United Arab Emirates and facing charges of kidnapping her young son have accused the UK authorities of abandoning her to her fate.
>
> [2] They also claim that, Afsana Lauchaux (sic), 46, was assaulted whilst in custody in Dubai and say they are 'disgusted' that the Foreign Office seems 'more interested in selling arms' to the country than helping her. Mrs Lauchaux, from Poplar, east London, was at the height of her career as a British civil servant and political consultant when she met a wealthy French currency dealer while travelling on business.
>
> [3] They were married in 2010 and the couple moved to Dubai. Shortly afterwards she gave birth to a baby boy named Louis.
>
> [4] However four months later, the family claim her French husband became abusive and violent. He also hid Louis's French passport, and refused to allow their child to be registered as a British citizen.
>
> [5] Fearing for her own safety, Ms Lauchaux escaped from the apartment, taking Louis with her.
>
> [6] She tried to return to the UK - but her husband secured a travel ban from a Dubai court and requested that the Dubai authorities confiscate her British passport.
>
> [7] He also initiated divorce proceedings and won custody of Louis.
>
> [8] Mrs Lauchaux's family claim that her husband raised several cases against her, which are based on Sharia law and effectively side with the husband. The spiralling costs meant that she ran out of money and became homeless, living off money sent to her by her two grown up sons from her first marriage, who had remained in London.
>
> [9] Trapped in Dubai, Mrs Lauchaux turned to the local embassy for help. At first, says her son, IT consultant, Rabbhi Yahiya, 26, the consulate were helpful.
>
> [10] They referred her to a refuge for victims of domestic violence (which rose 36% in UAE in 2012), but, according to Mr Yahiya, consulate officials didn't realise the refuge was legally bound to notify her husband once she checked in.
>
> [11] Mrs Lauchaux was forced on the run again.

[12] She again contacted the local consulate and officials this time advised her to go to the police station to face charges of libel her ex-husband had brought against her.

[13] Arriving at the police station, her son claims Ms. Lauchaux was physically assaulted by a police officer, and that her baby son was denied food and water.

[14] Then in October 2013, meeting with a friend for a coffee - her ex-husband arrived unexpectedly and snatched Louis, now aged three-and-a-half, from her arms. She has not seen him since.

[15] Ms Lauchaux's ex-husband then filed a further case against her for kidnapping, and if found guilty, she could face several years in prison.

[16] Mr Yahiya says he has written several letters to the Foreign Office to no avail.

[17] 'We saw that there were lots of high-profile politicians going out to support British companies, so we thought we could get them to raise my mothers (sic) case while they were there.'

[18] In the past year, David Cameron, William Hague, Alistair Burt and Hugh Robertson have all made official trips to Dubai in a bid to secure a lucrative sale of Eurofighter Typhoon military jets.

[19] 'Most of our letters, emails and phone calls were never returned. They don't want to jeopardise the sale,' claimed the son. The fighter jet deal fell through in January when Dubai pulled out unexpectedly.

[20] 'The British government have failed to support Afsana, because they were seduced by a lucrative potential arms deal,' said Rori Donaghy, director of Emirates Centre for Human Rights.

[21] 'As it happened, and despite all Cameron and Hague's efforts, the warplanes deal fell through anyway. They should be prioritising the welfare of their citizens, rather than arms sales that never even come to fruition.' Nick McGeehan, Middle East Director for Human Rights Watch, also added 'The UAE's dysfunctional system and laws that discriminate against women mean that Ms Lachaux cannot be guaranteed the fair trial to which she's entitled.'

[22] In December her MP, Jim Fitzpatrick, raised her case in Parliament.

[23] 'Sadly, although Afsana is a Muslim, because she is a woman in a Muslim country and because she is being reported by a man, even though he is French and, I believe, is not a Muslim, she has to explain and defend herself to each set of police officers who come to arrest her and, when she goes to report at police stations and is detained, she has to go through the elaborate process of explaining her circumstances all over again. She is not able to work and is surviving on what her family can send to her from London.

> [24] 'To compound Afsana's misery, she found out last month that her husband had divorced her and had successfully sued for custody of their child in a sharia court in Dubai more than 12 months ago. The rule in the UAE and under sharia law is that if 12 months have lapsed and the decision of the court has not been challenged, it is no longer appealable and is upheld. She was divorced and lost custody, but was not even aware of the fact.'
>
> [25] Yesterday he told The Independent: 'The way Ms Afsana Lauchaux has been treated by the Dubai authorities is appalling.
>
> [26] 'As a woman in a Muslim country the authorities there have taken the word of the man as true, and she has been subjected to the full rigours of the law, and more.'
>
> [27] A Foreign Office spokesperson told The Independent 'We cannot interfere in the judicial process of another country, and must respect their systems just as we expect them to respect the UK's laws and legal processes.'
>
> [28] She added: 'We will continue to provide consular assistance to the family.'

46. In his email he told Mr Sloan that he had "*ever so slightly tidied it up a bit*". In his evidence, Mr Johnson agreed with Ms Page QC's suggestion that this phrase was included to try and spare Mr Sloan's feelings for what amounted to a substantial re-write of his article. Mr Johnson said that his email had been "*over polite*" but that it was not unusual for him to make significant changes to a draft article. Ms Page QC asked Mr Johnson about material that had been inserted into the draft (the new paragraph [7] stating that the Claimant had initiated divorce proceedings and obtained custody of Louis). Mr Johnson was unable to remember any details about this, or confirm whether this new information had been taken from the *Daily Mail* article that he had found. Mr Johnson accepted that he had not drawn Mr Sloan's specific attention to the new material he had added, although he did ask him "*to give it a quick read through to make sure I haven't introduced any errors etc.*".

47. Mr Sloan responded to Mr Johnson at 15.58:

> "All looks good to me. When is it going up? Also is it going in paper? I'll let the family know. They're very pleased to be getting the coverage."

48. Mr Johnson was not able to recall whether he saw the article again before it was published. Ms Page QC asked Mr Johnson whether Mr Sloan's email had rung any "*alarm bells*" for him; suggesting that the family might have an agenda to promote. Mr Johnson said it had not:

> "… obviously the family want publicity and Mrs Lachaux wants the publicity because they want to… pressure the Government to help her. From our standpoint there is a woman who is claiming to be trapped in a foreign country that is not renowned for its women's rights and the family are appealing to the Foreign Office for help and they're not getting it. It's not surprising that the family would be pleased to be getting some coverage that would help put pressure on the Government to help her."

49. The Independent Article was published online in the evening of 24 January 2014 and in print the following day. The published article had been substantially cut down from the revised draft sent to Mr Sloan by Mr Johnson. In particular, reference to Sharia law that had appeared in earlier drafts of the article was removed from the Independent Article before it was finally published.

50. Prior to publication, no approach had been made to Claimant either to put the allegations to him or to obtain anything he wanted to say in rebuttal. In cross-examination, Mr Green accepted, looking back:

> "I think it would have been better definitely that we had approached him… I think the reason that we did not do this this time, or I did not do this, is it didn't occur to anyone involved in the story to do it was because we were focused on these other elements that I have been highlighting…"

He faintly suggested to Ms Page QC that the fact that the Claimant was not "*the subject*" of the Independent Article may have been the reason, but he accepted that this was reconstruction rather than his recollection. In his witness statement, Mr Green had said, based on a review of his emails rather than any independent recollection: "*I believe that there were two key reasons why it did not strike me as necessary to contact the Claimant. They were that he was not named and was not the main subject of the story.*"

51. Mr Johnson did not deal with the failure to contact the Claimant in his witness statement, but in cross-examination, he was more forthright: "*[The Claimant] wasn't named and this story wasn't about him.*" He could not remember whether he pointed out to anyone, at the time, that the Claimant had not been approached. It was clear to me from Mr Johnson's evidence that, as far as he was concerned, the failure to contact the Claimant was a mistake, not a conscious decision. Asked why he had not asked Mr Sloan to check the position about the Claimant's ill-treatment of Afsana, Mr Johnson said: "*I can only surmise that my thinking at the time was that was not the story. The story was about the lack of support from the FCO.*"

(3) Publication of the Standard Article

52. In early 2014, Charlotte Ross was the joint Deputy Editor of the *Evening Standard*. On 28 January 2014, she received an email from Robert Amies about Afsana Lachaux's plight. Mr Amies was Group Legal Adviser for the *Evening Standard*, and a friend of Afsana's family. He sent Ms Ross a link to an article in the *Daily Telegraph* – published on 22 January 2014 under the headline "*British mother fears losing her son as she faces jail in Dubai for 'kidnap'*" – and suggested a feature interview with one of Afsana's older sons, who lived in London. In her second witness statement, dated 4 December 2020, Ms Ross stated that she did not really know Mr Amies at the time the article was published and would not have felt pressured to run something simply because he had passed it on. The fact that he had suggested an article had no influence on the decisions that she took.

53. Ms Ross read the *Daily Telegraph* article and some other coverage of the story, including, she believed, an article appearing in the *Daily Mail* and the Independent Article. She thought that the coverage illustrated the ways in which the UAE system had worked against Mrs Lachaux. Ms Ross noted that Afsana's case was being supported by Human Rights Watch and her local MP and that Afsana was described as

a senior civil servant. This suggested to Ms Ross that the story had credibility and she decided to commission an article by one of the *Evening Standard* feature writers, Susannah Butter. Ms Ross forwarded Mr Amies' email to Ms Butter on 29 January 2014. Some further emails later, a meeting between Ms Butter and Rabbhi Yahiya, Afsana's son, was set up for 4 February 2014.

54. The meeting between Ms Butter and Mr Yahiya started at around 17.45 on 4 February 2014 and lasted for just over an hour. With Mr Yahiya's consent, the interview was recorded by Ms Butter. The trial documents included a typed document with the heading "*Background Information – AL trapped in Dubai*". Ms Butter confirmed in her evidence that she believed – although she could not recall – that it was likely that she was given this document by Mr Yahiya at their meeting, and that she had then made the annotations on the document. Ms Butter had transcribed her annotations on this document in the summer of 2020.

55. On Friday 7 February 2014, a 11.02, Ms Butter emailed Mr Amies:

> "The story about Afsana Lachaux is down to go in Monday's paper. I've gone to the FCO for a response but was wondering whether if you know how best to get a response from Bur Dubai Police Station and the Dubai police? I've tried the embassy here and they gave me a generic email address but weren't sure of the right person. Not to worry if not! I'm cutting down the copy now and then we'll get it legalled and fact check with Rabbhi."

Mr Amies responded, at 11.22, but was unable to provide anything other the generic email address from the Dubai Police's website.

56. At 11.28, Ms Butter emailed Mr Yahiya:

> "The piece is going in Monday's paper. We've got to try and get a response from Bur Dubai prison and the Dubai police about you mum's treatment. I know it's a Friday there so not the best time but do you have any idea who the best contact over there is? The Dubai embassy here told me to email [address given] but I was wondering if you knew of anyone better…
>
> I can give you a ring anytime between now and Sunday night to check the rest of it if you want, or go through it over email. Today would be best but whenever is easiest for you. Just let me know."

57. Ms Page QC put it to Ms Ross that Ms Butter was quite right that she needed to try and get a response from the prison and the police in relation to allegations of mistreatment that she intended to include in the article. Ms Ross responded: "*Yes, she's trying to corroborate what [Rabbhi] had said to her*". Ms Page QC suggested that it was important because the article was going to report incidents of alleged brutality towards Afsana. Ms Ross was reluctant to accept that and answered: "*… it doesn't make it clear what she's trying to clarify*". It appeared to me that the answer Ms Ross gave – and the further responses to follow up questions on the issue of Ms Butter wanting to put allegations to authorities in Dubai – sought to put an unwarranted gloss on what Ms Butter was doing. As is plain, from this email, and subsequent ones, Ms Butter had recognised – as basic journalistic good practice reflected in the Defendants' Code – that she needed to put any damaging allegations that were going to appear in the article to the subject of them for comment. In my view, Ms Ross's answers to these questions

were influenced by her recognition of the inconsistency in approach in not putting the allegations to the Claimant.

58. Ms Butter sent another email to Mr Yahiya, at 13.33, raising some further queries:

> "Three more quick things:
>
> Can I clarify when your mum discovered that her ex-husband had been granted custody? I've got this:
>
> > Her husband obtained a divorce in a Sharia court in August 2012. "My mum didn't even know. Men can do that in Dubai. She was denied custody on claims that Louis had eczema, making her an 'unfit mother'." She claimed to Yahiya that she had never met the four witnesses who testified against her. (HOW DID SHE KNOW WHO THEY WERE IF SHE WASN'T AT THE COURT? DID SHE LEARN THEIR NAMES LATER? WHEN DID SHE FIND OUT DIDN'T HAVE CUSTODY? She lived on the sofas of friends and "in squalid accommodation, living off noodles" with Louis, who his brother says is "sharp and funny. Last time I saw him I was playing a puzzle game and he was better at it than me."
>
> What's the chronology of her meeting him and telling you about him. I've got:
>
> > In 2010 Lachaux told her children she was seeing a French man, a comfortably-off avionics engineer, based in Dubai. Yahiya says: "I never asked where they met. We were glad my mum had found someone and was happy." They married in February 2010 and moved to Dubai in March. "It was the first time my mum had lived abroad. It was a big adventure. They were in love and expecting a child so she was excited. Now I remember that he seemed reserved and only his brother and parents came to the wedding, but at the time I didn't question it."
>
> Do you have the email that he sent you and your brother saying if you came to Dubai you'd be implicated in aiding kidnap and could we see it if legally necessary?"

59. There was an email response from Mr Yahiya to Ms Butter, at 13.44, asking whether he could call her. In her evidence, Ms Butter believed that they had spoken. She could not recall what was said, or whether Mr Yahiya had answered the questions she had asked. She had not made a note of the call. Ms Butter's email demonstrates that she was taking a critical approach to elements of Mr Yahiya's account and challenging him on some details. It is unfortunate that it is not now possible to establish what, if any, responses she received.

60. At 15.25, Ms Butter sent an email to the Dubai Police:

> "We are running an article about a woman called Afsana Lachaux in Monday's paper.
>
> She is standing trial on Tuesday by her ex-husband for kidnapping their son.

> In the piece her son mentions Lachaux being pushed in the face by a police guard at Bur Dubai prison and kept in a cell with her one-year-old son for six hours in 40 degree heat without food or water.
>
> It also says she went to the police on multiple occasions to tell them about being hit by her husband and they told her they didn't care if she lived or died, and she should just go home to her husband.
>
> Her son who lives here, Rabbhi Yahiya, says he has appealed to you but you said you can't intervene.
>
> We would like a response from you about both of these things – her treatment in Dubai, and Yahiya's appeals to you.
>
> If you could direct me to the appropriate person to get a response from I would be very grateful.
>
> The piece goes to print on Monday at 8am so it would need to be sent over before that."

61. At 15.56, Mr Yahiya sent some further documents by email to Ms Butter:

> "Please find attached some docs for your reference. They may help provide background info and context – sorry but the medical report is in Arabic but I (sic) from the incident when my mother was assaulted in Safa Park.
>
> As my mother has stated, she received very prejudicial treatment from the police and apparently they do not usually provide case numbers or references. However the UK FCO is fully aware of all complaints and allegations that my mother has raised regarding mistreatment and complaints to the police. They should have detailed correspondence on this – in fact I am sure of this.
>
> Let me know if you need anything else."

62. The documents he forwarded with that email were (1) "*Emergency Physician Note*s" for Afsana, as noted, written in Arabic dated 20 January 2012; (2) a chronology written by Afsana for incidents between 14 January 2011 to 21 January 2014 ("Afsana's Chronology"); (3) a print out from the website of the Judicial Branch of Arizona, Maricopa County which recorded steps in proceedings brought against the Claimant by Anna Montuori in 2002; and (4) a document with the heading "*Refuge Conditions*", written by Afsana, giving an account of the period she had spent in a women's refuge in Dubai between February and March 2012 ("the Refuge Report").

63. Ms Butter was questioned by Ms Page QC in detail about these documents. Ms Butter confirmed that she did not understand Arabic, but that she had sent a copy of the medical notes to a friend who did, and he had told her that the report had included a record of "*bruises on the lower back*". Ms Butter said that she had studied the documents she had been sent carefully and compared them with the text of her draft article.

64. In her evidence, Ms Butter said: "*I would never just repeat someone's serious allegations without looking into them a bit.*" Ultimately, she considered his account to be credible. Ms Page QC has criticised the rigour with which she approached this task,

and it is fair to say that there was material in Mr Yahiya's interview with Mr Butter which, if she had compared it with the documents he had provided – particularly Afsana's Chronology and the Refuge Report – cast some doubt on elements of his account and suggested that he was exaggerating the ill-treatment of his mother. To take one example, from the cross-examination, Mr Yahiya, in his interview, had claimed:

> "[The Claimant] got my mum flung into jail and said it was to teach her a lesson. And his own son, who was a year old, he had [them] locked up for eight hours in Bur Dubai. And this was two weeks after a British guy was beaten to death. It was the same jail cell. I can't remember his name…"

In Afsana's Chronology, the entry for 13 June 2011, recorded:

> "CID officers from Bur Dubai police turn up to my temporary accommodation and arrested and charged me with absconding because husband had asked for me to be placed on 'wanted' list. Louis (1 year old) and I spent hours in a prison cell and were refused access to food or water… Both the baby and I were held in a cell for over 4 hours without food or water. I was assaulted by a prison guard… during this incarceration."

65. In the Standard Article, Ms Butter stated that Afsana had been detained for 4 hours, preferring Afsana's account in her Chronology over the longer period suggested by Mr Yahiya, but recorded (incorrectly) that Mr Yahiya had stated that the period was 4 hours ([10]-[11]). The account of this incident, presented in the article, is in fact an amalgam of the details from Afsana's Chronology and Mr Yahiya's interview. It is not clear how Mr Yahiya (or Afsana) could have known that Afsana had been held in the same cell in which a person had been beaten to death. No satisfactory explanation has been given for any verification of this claim and it does look like something of an embellishment by Mr Yahiya.

66. Ultimately, Ms Page QC suggested to Ms Butter that comparison between Mr Yahiya's interview and the documents he had provided to her showed him to be an unreliable source. Ms Butter answered:

> "I was acting on what had been – there were a number of things, there was the fact that it had been widely reported in other newspapers, there was the fact that his mother was facing trial for kidnap, that wasn't a – that was an indisputable fact. It had been raised in the House of Commons, which I thought was a reputable source. I looked it up in Hansard and I read Jim Fitzpatrick's full statement about it where there were allegations of domestic abuse. So that's another person independent of the family talking about it in Parliament. I met this man for over an hour and formed an impression of him in good faith. So no, it wasn't staring me in the face at all and I tried to stand up for his claims and, as you can see from the article, I did not include everything that he told me."

67. At 16.06, Mr Yahiya forwarded what purported to be an email to him from the Claimant, dated 7 March 2012. In these proceedings, the Claimant has disputed the authenticity of this document. It is not necessary to investigate the variance between the document sent to Ms Butter and the version which the Claimant says is the true document, as it is not suggested that Ms Butter could or should have been aware that the email that Mr Yahiya had forwarded was not genuine. The importance, for present

purposes, is that email forwarded to Ms Butter contained the Claimant's email address, as Ms Butter said in her evidence she had noticed at the time.

68. At 16.09, Ms Butter received an email from the press department of the Foreign and Commonwealth Office ("FCO") providing a comment for publication. Ms Butter replied, at 16.37, asking the FCO whether they had contact details for the Dubai police force. The FCO replied, at 17.32, that they did not.

69. At 18.08, Mr Yahiya emailed Ms Butter providing her with a contact at the UK embassy in the UAE. He was unable to provide a contact for the Dubai police.

70. Ms Ross and Ms Butter were working on the story during the afternoon of 7 February 2014. Ms Ross explained that, as editor, her role was to commission the story and then to work on the article prior to publication. Ms Ross said that Ms Butter had considered that Mr Yahiya was credible. Ms Butter sent the text of the draft article to herself, by email at 17.39 that afternoon, and Ms Ross's evidence was that this was in almost identical terms to that which was ultimately published the following Monday. Ms Ross was aware that Ms Butter was raising queries with Mr Yahiya during the afternoon, but she did not believe that she had seen any of the emails or documents. She did recollect mention of the US injunction. Ms Ross did not recall being aware that Ms Butter had continued her efforts to obtain comment from various subjects of the article over the weekend.

71. At 10.06 on Saturday 8 February 2014, Ms Butter emailed the contact at the UK embassy provided by Mr Yahiya:

> "We are running an article about a woman called Afsana Lachaux in Monday's London Evening Standard.
>
> She is standing trial on Tuesday by her ex-husband for kidnapping their son.
>
> In the piece her son mentions Lachaux being pushed in the face by a police guard at Bur Dubai prison and kept in a cell with her one-year-old son for four hours in 40 degree heat without food or water.
>
> It also says she went to the police on multiple occasions to tell them about being hit by her husband and they told her they didn't care if she lived or died, and she should just go home to her husband.
>
> We would like a response from you about both of these things – her treatment in Dubai, and Yahiya's appeals to you.
>
> If you could direct me to the appropriate person to get a response from I would be very grateful.
>
> The piece goes to print on Monday at 8am so it would need to be sent over before that…"

72. The consular official replied at 07.15 on Sunday 9 February 2014 asking Ms Butter to direct her inquiry to the FCO Newsdesk, with whom Ms Butter had already been in contact. The FCO Newsdesk provided a further comment for publication by email at 18.03.

73. At 04.59 on Monday 10 February 2014, the Dubai Police responded to Ms Butter's inquiry (see [60] above) advising that she would need to contact them via diplomatic channels (i.e. via the UK Embassy).

74. At 10.21, Ms Butter replied to the UK consular official in Dubai:

> "Do you have the contact details of Bruno Lachaux's lawyers. We urgently need to get in touch with them."

75. At 10.28, Ms Butter sent an email to the French Embassy in Dubai:

> "We are running an article about a woman called Afsana Lachaux in Monday's paper.
>
> She is standing trial on Tuesday by her ex-husband, Bruno Lachaux, for kidnapping their son.
>
> In the piece her son mentions Afsana being beaten by Bruno and him trying to snatch their child in the park.
>
> We would urgently like a response from Bruno Lachaux – do you have the details of his lawyers?
>
> If you could direct me to the appropriate person to get a response from as soon as possible I would be very grateful."

76. At 12.22, the UK consular official replied to Ms Butter's email confirming that she did not have the contact details for the Claimant's lawyers.

77. The Standard Article was published online at around 11am on 10 February 2014 and in print later that afternoon. Despite Ms Butter's belated efforts to contact him, the Standard Article was published without any of the allegations having been put to the Claimant and, in consequence, apart from the sentence at the end of Paragraph [4], the article contained no response or rebuttal from the Claimant.

78. In her witness statement, Ms Butter said this about her efforts to contact the Claimant prior to publication of the Standard Article:

> "… I do not recollect sending the mail to the French consulate at 10.28 and cannot recollect why I did it, as it was too late to get a response from Mr Lachaux. Whatever the reason for my late attempt to contact Mr Lachaux, I do not recollect having any misgivings about the form that the Article was in at the time it was published, which made clear that the reported allegations of domestic violence by Mr Lachaux were denied and had not been tested in any court."

79. In cross-examination, Ms Butter said she could not recall there being any discussion about delaying publication of the article in order to contact the Claimant. The article was obviously topical because of Afsana's impending court appearance the following day. Asked whether there was any particular urgency in publication or whether the article could have been held back, Ms Butter answered:

> "I think we did want to run before her trial because we wanted to show -- because our aim in -- well, as far as I saw it, our aim in getting the article out was to show

> the FCO and the Dubai government that the world would was watching how they had treated this woman in what we saw as a different way to how she'd be treated in the UK. So I think that was the peck, and we do tend to do articles before the trial unless -- then maybe do a follow-up after the trial, but I think it -- we did want if, it was going to run, it would run before the trial, but then, if there was a substantial reason for it to not run -- well, not me, but the editors would have pulled it."

80. Ms Butter acknowledged that the last-minute efforts to contact the Claimant meant that it was unlikely that any response would have been able to have been included in the original publication. Nevertheless, had a response been provided, she said that the online version of the article could have been updated and subsequent print editions, depending on timing.

81. In her witness statement, Ms Ross said:

> "I do not recollect making a conscious decision about whether to contact Mr Lachaux. I am now aware that Susannah sent an email to the French Consulate at 10.28 am on 10 February seeking contact information for Mr Lachaux's lawyers for a response. This is not something that I recollect from the time, or that I believe I would have asked her to do. As far as I was concerned, the Article was ready for publication on the Friday. The form that it was in did not call for a response from Mr Lachaux and in any case, it was far too late to reasonably expect one at that point… The absence of an attempt to contact Mr Lachaux, which would have been apparent to me from the article, would not have raised a question mark in my mind as to the public interest in publishing it."

82. Ms Ross accepted, in cross-examination, that Ms Butter had sought comment from both the FCO and the Dubai police prior to publication (see [57] above). She stated that she believed, but had no clear recollection, that she first became aware of Ms Butter's attempts to contact the Claimant in December 2014 following the legal complaint. She said, however, that she was "*very sure that she would not have asked [Ms Butter] to make an approach, particularly at that time… I do remember being very surprised in the December conversations when I heard that. I remember being very surprised.*" The cross-examination then continued:

> Q. Why were you surprised?
>
> A. It's too late to get a response and it's an indirect route.
>
> Q. I see. But you were surprised that she left it so late?
>
> A. I was surprised that it was happening in those circumstances.
>
> Q. You mean you were surprised that she at any stage would have sought a response from Mr Lachaux, or you are surprised that she was seeking it over the weekend -- on the Monday?
>
> A. Certainly, on the Monday morning. In terms of the article, it was prepared without a response, and we were happy with it on the Friday.
>
> Q. That was a deliberate decision, was it, to have no response in the article?

> A. As I say, I don't recollect making a conscious decision about that. The publication preparation work that you do is an ongoing process. It's a constant series of editorial adjustments that you make and I don't remember making a decision or not about that…

83. Ms Page QC suggested to Ms Ross that the failure to put the allegations to the Claimant prior to publication was a breach of obligation in the Defendants' Code to ensure that any potentially damaging story is put to the subject before publication (see [25(iv)] above). Ms Ross did not accept that this part of the Defendants' Code applied in this case. Asked why not, Ms Ross stated that it was an article "*about the situation that Mrs Lachaux found herself in.*" The cross-examination continued:

> Q. It's a damaging story to Mr Lachaux, isn't it, Ms Ross?
>
> A. It's not for me to say.
>
> Q. No, you see for yourself it's a damaging story.
>
> A. I think it's a complicated story.
>
> Q. It's a damaging story.
>
> A. I think it's complicated.
>
> Q. Are you really not prepared to accept that this is a story damaging to the husband of Mrs Lachaux? Is that your truthful response?
>
> A. It does contain allegations that are serious and I do accept that.
>
> Q. And damaging; why aren't you prepared to accept the word "damaging"?
>
> A. Well, my hesitation is actually about the court case that came afterwards

84. That last passage of cross-examination perhaps neatly demonstrates a phenomenon that is commonly seen in litigation: the burden that a witness feels not to give an answer that s/he perceives might damage the case. In adversarial litigation, where often much is at stake, it is a situation that may be difficult to avoid. But a witness should not shoulder this load. S/he should simply give truthful answers to the questions given. The consequences of the answer – which most witnesses will simply not be in a position accurately to judge – are matters for submission by the parties. I repeat here that Ms Ross was plainly a truthful witness, but she was also intelligent and was clearly concerned about the consequences to the Second Defendant's case if she accepted that the allegations made in the article against the Claimant were damaging. She need not have been worried on this score. Since the decision on meaning and serious harm, there is no dispute that the Standard Article contained damaging allegations about the Claimant the publication of which caused serious harm to his reputation.

85. I reject Ms Ross' contention that the Defendants' Code did not, in this instance, require that the substance of the allegations to be made against the Claimant to be put to him for comment prior to publication. Plainly, it did. Ms Ross's evidence as to why the

Defendants' Code did not apply was unconvincing and was advanced by her to try and defend the failure to put the allegations to the Claimant. The situation was in this respect, the same as with the Independent Article. Of all the people mentioned in the Standard Article, the Claimant was the person whose reputation stood to be damaged the most. Unlike the anonymous police officer(s) who allegedly ignored Afsana's complaints and mistreated her in detention ([4], [9], [10] and [12]) and the unnamed prison guard alleged to have assaulted Afsana ([11]), the Claimant was readily identifiable.

(4) High Court Family Proceedings between the Claimant and Afsana

86. Afsana brought a claim in the Family Division of the High Court seeking an order for contact with Louis ("the Family Proceedings"). The Claimant resisted the application and also sought a declaration that the divorce granted by the Court in the UAE on 12 August 2012 was valid. Both parties were represented by Leading and Junior Counsel and solicitors.

87. On 2 March 2017, Mostyn J handed down a fact-finding judgment in the Family Proceedings: [2017] 4 WLR 57. As recorded in the judgment, during the hearing, the Claimant agreed to facilitate contact between Afsana and Louis: [3]. Formally, however, the Judge dismissed Afsana's application for contact and granted the declaration sought by the Claimant. Mostyn J's decision – which is not binding on the parties in these proceedings – has only limited legal relevance to the issues I have to decide. As it post-dates the original publication of the articles, it is irrelevant to the s.4 defence in respect of that publication. It has a bearing only on the continued publication of the articles after the judgment was given. The Judge's key factual findings were contained in the following paragraphs:

> [122] ... As will by now be apparent I reject the majority of the mother's case. I do not accept that she was a victim of abuse, threats and violence from the father, although I do accept that the relationship was stormy and that in the course of frequent arguments each hurled accusatory insults at the other. I do not accept that she was fearful of him. I do not accept that her complaints were not investigated or taken seriously by the police and the court. I do not accept that she was mistreated by the police. I emphatically do not accept that she lived in hiding as she was fearful of the father and the authorities. She went underground to prevent the father seeing his child and because she feared she would lose the case brought by him. I do not accept that she was trapped in Dubai as a result of travel bans or confiscation of her passport. After she was found she was able to leave without let or hindrance. I do not accept that she did not have notice of the divorce proceedings or the opportunity to participate in them. She did participate in them and filed an extensive defence and counterclaim. I do not accept that she did not have adequate representation and did not have the means to secure adequate representation. I do not accept that the proceedings were unfair. The ground for divorce used in this case is virtually identical to our most commonly used one (unreasonable behaviour), and the custody laws are best interests based. The mother was not divorced on traditional Islamic grounds and sharia judges did not steal her son.
>
> [123] I do accept that from April 2011 the mother and Louis were excluded by the father from the marital home and had no suitable accommodation. I do

> accept that the father provided the mother with no financial support; that she was impoverished; and that she was unable to work and survived on charitable handouts and money sent by her family. I do accept that the mother has suffered from depression for a long time and also PTSD resulting from her experiences in Dubai. However neither of these conditions affect her capacity or absolve her from responsibility for her conduct. I do accept that until I intervened the father had failed to promote the relationship between mother and Louis. However, that failure must be set against the mother's conduct when she disappeared off the map with Louis for 19 months.

The Judge also found that the Claimant had not sought a religious Islamic divorce from Afsana: [70].

88. These findings were reached after he had heard evidence from both the Claimant and Afsana, and after cross-examination which had "*exhaustively analysed*" the disputed facts and available documents: [10]. In addition to the findings made in [123], the Judge made at least one further finding adverse to the Claimant and, in doing so, rejected part of his evidence: [50].

89. Following Mostyn J's decision, both articles were very briefly taken down from the Defendants' websites before being reinstated – with amendments (see [95(iii)] below) – on or around 4 March 2017.

90. An appeal by Afsana against the decision of Mostyn J was dismissed by the Court of Appeal on 1 May 2019. Moylan LJ held, *inter alia*, that there was no basis to interfere with Mostyn J's evaluation of the evidence or his factual findings: [2019] 4 WLR 86 [189(i)].

(5) Subsequent amendments to the Articles online and their continued publication

91. Letters of complaint were sent by the Claimant's solicitors to the First and Second Defendants on 22 and 23 September 2014, respectively. Both set out fully the Claimant's complaint and each asked the respective Defendant to cease publishing the relevant article. In the light of the Defendants' decision to continue publication of the articles following complaint, I need to set out the key parts of the Claimant's solicitors' letters. Each letter sent to each Defendant was different (reflecting differences in the relevant articles), but both set out the meanings that the Claimant attached to the respective articles and each included sections headed "*Factual inaccuracy*" and "*No defence of reasonable belief that publication in the public interest*".

92. The letter to the First Defendant, dated 22 September 2014, concerning the Independent Article contained the following:

> "**Factual inaccuracy**
>
> We are instructed by Mr Lachaux… that each of the allegations that go to make up the defamatory meaning specified above is substantially untrue and constitutes a serious factual inaccuracy concerning himself. Without prejudice to the burden of proof on the issue of truth (which in cases of defamation is on the publisher), we make the following observations:

(1) Mr Lachaux has never been violent towards Afsana, whether after the birth of their son Louis or at any time. While they were living with one another in Dubai following Louis's birth, Mr Lachaux gave Afsana no cause to fear for her safety or to 'escape' and go on the run. On the contrary it was Afsana who on 14 January 2011 attacked and assaulted Mr Lachaux in their home, repeatedly beating him with her hands and the heels of some stiletto shoes, threatening and attempting to stab him with a kitchen knife, and spitting in his face. Mr Lachaux has in his possession contemporaneous documentary evidence including medical reports and photographs showing the extent of the injuries in the form of cuts, scratches and bruises that he received at Afsana's hands. He also retains text messages sent to him by Afsana the day after the attack apologising and asking to be forgiven for her behaviour. When Afsana left our client to return to the UK on 4 April 2011, the day of Louis's first birthday, she did so of her own accord and without taking Louis, leaving him with his father in Dubai.

(2) Mr Lachaux has not falsely accused Afsana of kidnapping their son. In so far as Mr Lachaux has accused Afsana of 'kidnapping' – more accurately, abducting – their son Louis, he has done so truthfully. The true facts are these. Following Afsana's return to Dubai from the UK after Mr Lachaux filed for divorce from her (on 11 April 2011), she abducted Louis and disappeared with him for three lengthy periods of time, the first between 17 April and 13 June 2011, the second between 14 June and 20 December 2011 and the third between 9 March 2012 and 29 October 2013. The second and third abductions were committed in breach of contact and visitation rights that Mr Lachaux had been granted on 12 Jun 2011 in the course of the divorce proceedings. Furthermore, after 12 August 2012, when Mr Lachaux was awarded custody of Louis by the Dubai Court, Afsana's abduction of Louis was prosecuted by the criminal authorities in Dubai and eventually (on 13 February 2014) convicted by the Dubai Court of an offence of child abduction, receiving a sentence of one month's imprisonment suspended for three years. Afsana carried out these acts of abduction of her own initiative and volition. Accordingly, it was not any false charge of kidnapping on the part of our client that had resulted in Afsana facing (at the time of the Article's first publication) a jail term in Dubai, but her own conduct in deciding to abduct Louis.

(3) Mr Lachaux has never snatched Louis from his mother's arms, whether in October 2013 or at any other time, whether "when his mother was meeting a friend", or otherwise. The true facts concerning the event to which the Article appears to be referring here, namely, Mr Lachaux's being reunited with Louis in October 2013 after his mother's abduction of him in March 2012, the true facts are as follows. Having searched indefatigably for his son for a period of some 19 months, on 29 October 2013 Mr Lachaux eventually located Louis (then aged 3½) in a part in Dubai, being looked after by strangers. There was no sign of Louis's mother. By the time the police attended Afsana's apartment, after Mr Lachaux called them to inform them that he had found Louis, Afsana had already absconded. Mr Lachaux then took Louis home, as he was fully entitled to do, having been awarded custody of him by the Court on 12 August 2012. Under these circumstances, there is simply no question of Mr Lachaux having 'snatched' Louis from Afsana, or of his having done so callously or without justification.

For these reasons, as you will appreciate, the Article is nothing less than a travesty of the truth.

No defence of reasonable belief that publication in the public interest

We take this opportunity to add the following observations: it is impossible that any person at *The Independent* with editorial responsibility for the Article could have *reasonably* believed, prior to publication, that to publish it would be in the public interest. Any responsible editor ought to have realised: (a) that the Article was highly defamatory of Mr Lachaux; (b) that despite that, so far as it concerned Mr Lachaux, the Article was wholly one-sided and lacking in balance; (c) that the Article was based on the testimony of sources (Afsana, and her son Rabbhi Yahiya) with an obvious axe to grind in circumstances where it was highly likely that there would be another side to the story; and (d) that notwithstanding this, no effort was made to verify the source's allegations with Mr Lachaux or to put them to him for comment prior to publication. Publication, in short, was utterly irresponsible, and could not have been thought by anyone to be in the public interest. The Article was only apt to mislead. Its continued publication now, following this complaint, would be indefensible."

93. The letter to the Second Defendant, dated 23 September 2014, concerning the Standard Article contained the following:

"**Factual inaccuracy**

We are instructed by Mr Lachaux… that each of the allegations that go to make up the defamatory meaning specified above is substantially untrue and constitutes a serious factual inaccuracy concerning himself. Without prejudice to the burden of proof on the issue of truth (which in cases of defamation is on the publisher), we make the following observations:

(1) Mr Lachaux has never been violent towards Afsana, whether within months of marrying her or at any time. He has never beaten her. He has never bruised her. On the contrary it was Afsana who became violent towards Mr Lachaux while they were living with one another in Dubai. On 14 January 2011 she attacked and assaulted Mr Lachaux in their home, repeatedly beating him with her hands and the heels of some stiletto shoes, threatening and attempting to stab him with a kitchen knife, and spitting in his face. Mr Lachaux has in his possession contemporaneous documentary evidence including medical reports and photographs showing the extent of the injuries in the form of cuts, scratches and bruising that he received at Afsana's hands. He also retains text messages sent to him by Afsana the day after the attack apologising and asking to be forgiven for her behaviour.

(2) It follows from this that Mr Lachaux has never assaulted Afsana in public on custody visits relating to their young son. This is sheer malicious invention.

(3) Mr Lachaux has never attempted to snatch Louis on a custody visit, and has never done anything that has left Louis with a badly bruised head or harmed him in any way. On the contrary, it was Afsana who in the course of a pre-arranged contact visit between Mr Lachaux and Louis in the public garden of Al Safa Park, Dubai on 20 January 2012 (pursuant to contact and

visitation rights granted to Mr Lachaux by the Dubai Court on 12 June 2011 in the course of divorce proceedings between Afsana and himself) snatched Louis from Mr Lachaux suddenly and without warning, in a manner which could easily have resulted in Louis's physical injury. Towards the end of the contact visit, and without an warning to Mr Lachaux, Afsana suddenly and with considerable force, pulled Louis out of his father's arms, causing her to fall backwards with Louis on the ground. Louis was upset and cried a great deal. Afsana later initiated a criminal complaint of assault against Mr Lachaux arising from this incident, claiming that he had pushed her when he was holding Louis, causing her to fall down and hit her head on the ground. On 11 April 2012, the Dubai Public Prosecutor dismissed this complaint after hearing evidence from an independent witness, Mrs Nadia Samad Mian Abdul Amad Jabbar, who had observed the incident. Mrs Jabbar attested, consistently with Mr Lachaux's account of the matter, that she had seen Afsana pull the child from Mr Lachaux's arms and, in consequence, lose her balance and fall to the ground. Mrs Jabbar also gave evidence that she did not see Mr Lachaux physically abuse Afsana, as Afsana had alleged.

(4) Mr Lachaux has never snatched Louis out of his pushchair in the street, whether in October last year as alleged in the Article, or at any time. Moreover, this is an entirely false description of the circumstances in which Mr Lachaux came lawfully to regain custody of his son. The true facts (in summary) are these. On 4 April 2011, the day of Louis's first birthday, Afsana abruptly left Mr Lachaux and Louis in Dubai and returned to the UK on a one way ticket which her adult son, Rabbhi Yahiya visiting since 28 March 2011, had bought for her. The marriage had been in difficulty prior to this: see for instance the incident referred to in paragraph (1) above. When Afsana had not returned to Dubai by 11 April 2011, Mr Lachaux initiated divorce proceedings in the Dubai Court on grounds of family abandonment. Afsana then came back to Dubai, without informing Mr Lachaux, whereupon she abducted Louis and disappeared with him for three lengthy periods of time, the first between 17 April and 13 June 2011, the second between 14 June and 20 December 2011, and the third between 9 March 2012 and 29 October 2013. The second and third abductions were committed in breach of contact and visitation rights that Mr Lachaux had been granted on 12 June 2011 in the course of the divorce proceedings. Furthermore, after 12 August 2012, when Mr Lachaux was awarded custody of Louis by the Dubai Court, Afsana's abduction of Louis was in breach of the custody order too. (It was this conduct that resulted in Afsana being prosecuted and, on 13 February 2014, being convicted by the Dubai Court of an offence of child abduction.) Throughout the 19-month period of the third abduction, Mr Lachaux had searched indefatigably for Louis and eventually located him, on 29 October 2013, in a park in Dubai, then aged 3½, being looked after by strangers. There was no sign of Louis's mother. By the time the police attended at Afsana's apartment – Mr Lachaux called them to inform them that he had found Louis – she had already absconded. Mr Lachaux then took Louis home, as he was lawfully entitled to do, having been awarded custody of him by the Court.

(5) It was not Mr Lachaux who subjected Afsana to the prospect of being jailed in Dubai, but Afsana herself. It was her own conduct in deciding to abduct

> Louis which had exposed her to that possibility, not anything that Mr Lachaux had done. In particular, Afsana had not 'fled' with Louis to 'escape' Mr Lachaux's violent abuse – there had been no violent abuse from her to escape from – but had taken Louis away of her own initiative and volition. Under the circumstances, in so far as Afsana was (at the time of the Article's first publication) facing jail in Dubai for abducting her own child, that was not Mr Lachaux's fault; it was a situation she had brought upon herself.
>
> For these reasons, as you will appreciate, the Article was nothing less of a travesty of the truth."

Under the heading "*No defence of reasonable belief that publication in the public interest*", the letter to the Second Defendant contained a paragraph in substantially the same terms as that sent to the First Defendant.

94. A substantive response to the Claimant's letters of complaint was sent, on behalf of both Defendants, on 16 October 2014. The Defendants refused to take down the online versions of the articles. The letter did not engage with the factual rebuttal raised by the Claimant to the allegations made in the articles.

95. The online versions of the two articles have, since original publication, been amended at various stages. Copies of the articles showing the amendments that were made were provided at the trial. This is not an area that assumed great importance during the trial, so I will set out, here, only what I regard to be the key changes.

i) On 18 November 2014, the online versions of the two articles were amended to add the following at the foot of each article:

> "We have been contacted by Bruno Lachaux's representatives in relation to this article. Mr Lachaux wishes to make clear that he strongly disputes his former wife's version of events. In particular, he says he did not become violent and abusive towards Afsana Lachaux within months of marrying her. He says he did not assault her in public, neither did he attempt to snatch their son on a custody visit. He denies the allegation that he accused his former wife without reason of kidnapping their child. Rather, he accused her of abduction and a court in Dubai found her guilty of that charge".

ii) On 23 January 2015 – the date on which the Defendants filed their original Defences relying upon a public interest defence under s.4 – both articles were further amended. In paragraph [4] of the Standard Article, the final sentence was amended to: "*Her ex-husband denies any physical violence or other abuse*" and paragraph [12] was deleted. In the Independent Article, the following paragraph was added, between paragraphs [7] and [8]:

> "Fearing for her own safety, her son says, Mrs Lachaux was forced on the run. In August 2012, in her absence, the court, applying Sharia, gave custody to her ex-husband on the basis that Ms Lachaux was an unfit mother."

iii) On 4 March 2017, following Mostyn J's judgment, the following paragraph was added at the top of both articles:

> "Update: On 2 March 2017 Mr Justice Mostyn handed down a decision in the Family Division of the High Court in London which rejected allegations made by Afsana Lachaux that were reported in this article. In particular the Judge found she was 'not a victim of abuse, threats or violence' from her husband. A report of this decision can be found by clicking here."

The hyperlink took a reader to an article in substantially the same terms published by both titles on 3 March 2017, under the headline: "*Ex-aide to Gordon Brown loses her UK divorce battle*", which reported the judgment of Mostyn J. Neither the update, nor either of the articles, provided a link to Mostyn J's judgment.

96. Since the amendments made on 4 March 2017, each article had continued to be published by the respective defendant on its website.

97. The Defendants have relied upon the evidence of Mr Gore as the person who decided that it was in the public interest to continue publishing the articles following receipt of the letters of complaint and, later, the judgment of Mostyn J. Mr Gore is now the Head of Partnerships and Projects at the National Council for the Training of Journalists. In September 2014, he was Deputy Managing Editor of *The Independent* and *Evening Standard*, a post he had held since 2011. Prior to that, Mr Gore had worked for the Press Complaints Commission. One of his roles, as Deputy Managing Editor, was to decide whether to take down or update an article that was being published online by either Defendant.

98. In his first witness statement, dated 13 July 2020, Mr Gore explained the basis of the Defendants' decision to continue publishing the articles, following receipt of letters of complaint by the Claimant's solicitors (footnotes omitted):

> "6. My immediate impression on considering the complaint was that, wherever the truth lay with the allegations of domestic violence and abuse, Mr Lachaux had used a patriarchal system of law to his advantage, and to the disadvantage of Mrs Lachaux. He had, it seemed to me, been savvier in how to use the law than Mrs Lachaux and the consequence was she had, effectively, lost her son. The way our articles were positioned was not some sort of malicious attempt to smear him. They were using a particularly tragic example to highlight to our readers the potential dangers for women of becoming embroiled in the legal system in the UAE, which, on the face of it, tended to favour men. That seemed to me to be a matter of public interest, especially bearing in mind the large number of UK expats working and living in the UAE.
>
> 7. When I found out more it seemed plain to me that Mr Lachaux had set out to use, to his benefit, a legal system that discriminated against women and particularly a woman in Mrs Lachaux's position. When Louis was born Mr Lachaux registered his birth and obtained a French passport. Mrs Lachaux had no means of obtaining a British passport for Louis or compelling Mr Lachaux to provide her with his French passport. She could not work in the UAE and he was much wealthier than her. She could not leave the UAE unless she left Louis behind; yet for as long as she stayed in the UAE she had nowhere of her own to live and no financial support from

Mr Lachaux. I was particularly struck by the fact that, although they had got married in London and signed a pre-nuptial agreement that French law would govern their relations Mr Lachaux chose to divorce and seek custody in the UAE under the local law, which was based on Sharia. He opposed Mrs Lachaux's application to apply British law disparaging it as 'man-made'.

8. I saw court documents in which he claimed that Mrs Lachaux was an unfit mother supported by claims that she drank alcohol, ceased breast feeding because she drank alcohol, had gay friends (referred to as 'sinners'), had a debauched social life, had travelled abroad, failed to obey him and had failed to treat Louis' eczema because she was too busy frequenting nightclubs. Mr Lachaux relied on a photograph of Mrs Lachaux with a glass of wine next to a gay friend, wearing a celebratory mehndi design or her arm and hand, which was also used against her. It seemed to me that Mrs Lachaux had an uncontroversial social life by Western standards, if not Sharia standards, and that it did not cast doubt on her fitness to raise Louis. She had raised two adult sons. I saw Mr Lachaux's application for an order to prevent Louis leaving the UAE which described Mrs Lachaux as the 'incubator' and appeared to be based on the right of the father under UAE law to keep a child's passport and prevent the child from leaving the UAE without his consent.

9. All in all, the system in the UAE appeared significantly different to the one we know here. The obligation to obey a husband and the right to chastise appeared to permeate the attitude of the authorities towards the treatment of domestic abuse. It seemed that there were evidential restrictions that would work against a domestic abuse victim, such as a witness requirement of at least one man. I saw a Case Note from the British consulate in Dubai which recorded advice being given to Mrs Lachaux that 'in this country the father has more rights than the mother' and she was therefore encouraged to 'sort things out amicably with her husband'. The FCO's consistent stance was that it could not interfere in the judicial process of another country and must respect their systems, although it did change its guidance on living in the UAE, ostensibly as a result of the media coverage of Mrs Lachaux's case.

10. I was also influenced by the fact that this discriminatory process had led to Mrs Lachaux having no contact with Louis in the period prior to the initial publication of the articles and that she still had not had any contact with him at the time of the complaint or the prospect of having any. I thought that this reflected worse on Mr Lachaux than the contested allegations of domestic violence and inflicted a more grievous injury on Mrs Lachaux. It also bolstered the public interest in the continued publication: the lack of any resolution (or even sign of a resolution) highlighted the seriousness of the potential consequences for a woman in her situation.

11. In this context it was also relevant that, in April 2014, after first publication of the articles, Mr Lachaux applied to have the divorce and custody judgments registered in Paris. I understood that this would enable them to be recognised under French and English law.

12. Mr Lachaux's complaint was not directed to his cynical use (as I saw it) of the discriminatory system which led to Mrs Lachaux being deprived of

contact with Louis. It did not undermine any of the public interest factors that justified publication of the articles.

13. I also believe that there is an intrinsic value to the public in having access to an archive of material comprising the content that has been produced by any given news outlet. It reflects the events of the day and interpretations of the time. To remove an article altogether is generally much less preferable than updating it.

14. Other reports of Mrs Lachaux's allegations remained widely accessible which was a further factor against removing access to our articles.

15. For the reasons explained above, I decided that it was appropriate to continue publishing the articles albeit with an update reflecting the contents of Mr Lachaux's complaint and believed that it was in the public interest to do so. Mr Lachaux was invited to engage with the proposed update, but his position was that the articles should no longer be published.

16. In addition, some changes were made to the online articles to reflect information that had been acquired following the complaint. Any suggestion that a reference to "Sharia" was added to The Independent article in an attempt to bolster the defence of the libel claims is wrong.

17. It was quite clear from the article as it originally appeared that the thrust of the story was that Mrs Lachaux had, as result of Mr Lachaux's use of local laws in Dubai (which it was claimed discriminated against women), lost custody of her son, had subsequently been unable to have any contact with him and was being prosecuted for kidnapping him. Without the features of the Dubai legal and law enforcement system referred to in the article, there was fundamentally no story to be reported.

18. Prior to publication the article contained two references to Sharia which were removed by sub-editors - presumably for space reasons or because they thought the point was self- evident. Reinstating it after the complaint was not part of some neat trick to change the thrust of the story. Rather, when looking at the piece afresh, it simply seemed sensible to reinstate the reference in the event that some readers might not have realised that local Dubai laws were based on Sharia."

99. Mr Gore did not, in that witness statement, deal with Mostyn J's judgment. He addressed this issue in his second witness statement, dated 4 December 2020, stating:

> "I read the judgment of Mr Justice Mostyn shortly after it was handed down. Having reflected on it, I believed that it was in the public interest to continue publishing our original articles with the addition of a note summarising that judgment (in addition to publishing reports of it). In my view, the public interest factors referred to in my first statement remained valid. I noted too that the judgment was critical of both the parties; the defamation actions which Mr Lachaux had brought against [the Defendants] were at the time, in the Court of Appeal; and what's more, the French courts had at that time refused to recognise the Dubai divorce judgment. I believed that the steps that were taken following the

> judgment were right and appropriate. They were not some effort to upset Mr Lachaux."

100. Mr Gore was cross-examined at the trial on this evidence. He accepted that, when he first received the letters of complaint from the Claimant's solicitors, he considered that the articles had contained "*some serious allegations about [the Claimant], albeit that he wasn't named, and the allegations were presented as those of the family*". Mr Gore, however, stated that it had not struck him that the failure to put the allegations to the Claimant prior to publication was a "*glaring error*". In respect of the letter of complaint, Mr Gore accepted that the letters of complaint contained a "*highly detailed rebuttal*" of the allegations against the Claimant. He did not accept that the articles were wholly one-sided. The Standard Article, he said, had stated that the Claimant had denied the allegations. He accepted that the articles were based on sources (Afsana and Mr Yahiya) who had an obvious axe to grind and in circumstances where it was highly likely that there would be another side to the story. Mr Gore stated in his evidence that, following receipt of the complaint from the Claimant, he did not form an immediate view as to whether Afsana's allegations of domestic violence and assault were true, but "*further down the line… I thought that they were probably true*".

101. Ms Page QC asked Mr Gore whether he accepted the findings made by Mostyn J. Mr Gore replied: "*I didn't accept them on the principle that there seemed to be no discrimination in the use of the local UAE laws. That didn't seem to me to be the case*". Ms Page QC asked Mr Gore whether he accepted the factual findings made by the Judge in paragraph [122] of his judgment (set out in [87] above). Mr Gore said: "*I'm not sure that I agreed with it, but I guess I accept it*". Pressed by Ms Page QC as to the Judge's factual findings, Mr Gore said that he was not claiming to be in a position to know better than the Judge. Ms Page asked why the Defendants had waited until 13 December 2017 to withdraw the defences of truth that had been included in the Defendants' Defences. Mr Gore answered:

> "I think our view was several points. First of all, it appeared to be the case that Afsana Lachaux was planning to appeal the decision of Mr Justice Mostyn; secondly, the [Defendants'] appeal in the serious harm case had yet to be heard, I think, at the Supreme Court; and given all of that, it seemed to me that our course of action in reporting the outcome of this family hearing, adding the addendums to the original articles was the most appropriate course of action, and, as you say, we did not remove or recant the truth defence until a later date"

102. In that answer, Mr Gore got the chronology of the serious harm appeal mixed up. The Court of Appeal heard argument on the appeal against the decision of Warby J on 29-30 November 2016. Judgment was given by the Court of Appeal on 12 September 2017. Permission to appeal to the Supreme Court was granted on 21 March 2018. The appeal was heard by the Supreme Court on 13-14 November 2018, and judgment given on 12 June 2019. Mostyn J's judgment was handed down whilst the Court of Appeal were considering the serious harm judgment. The withdrawal of the defences of truth – on 13 December 2017 – was after the Court of Appeal decision of serious harm, but before permission to appeal to the Supreme Court had been granted.

103. As to the decision to continue publishing the articles, with the addition of a paragraph referring to the Mostyn J judgment and a link to the article reporting the decision,

Mr Gore amplified his evidence (given in paragraph 13 of this first witness statement) and said:

> "… my view has – has always been – that removing published material wholly from the public archive… is not an ideal way to proceed and it's much better to update articles to add addenda and so on, as we did in this case, and I think that was the right thing to do."

104. Ms Page QC put to him that the allegations made against the Claimant in the original articles had been "*thoroughly discredited*". Mr Gore replied:

> "But I think that what we were doing was giving any potential future readers the opportunity to examine both the original materials, the addendum that we had added at the point at which we received the complaint, and the update following the judgment in the family court. And that seemed to me to be the appropriate way to proceed… I think the central fact here is that our view remained the case and indeed remains the case that there was a public interest in the story itself in relation to the way that Afsana Lachaux had been treated in Dubai. And notwithstanding the judgment in the Family Courts, our view remained that it was in the public interest for that story to be aired and additionally to be updated in appropriate ways so that anyone seeing it now, for example, would know what the position was."

I have set out the full extract from this part of Mr Gore's cross-examination in Appendix 2.

(6) Fading Memories and the paucity of contemporaneous documentation

105. As a result of the appeal to the Supreme Court, a substantial period has elapsed between the key events, which took place in January-February 2014, and the trial, which took place over 7 years later. Despite the Defendants' Code's emphasis on the need to preserve contemporaneous records and documents, apart from emails and a couple of notes, there are very few contemporaneous documents that can shed light on the events that led to publication. Strikingly, there are no documents that record, or even refer to, the decision-making process that led to the original publication of the articles and, specifically, any assessment of whether, and if so, why it was concluded that it was in the public interest originally to publish the articles, or, thereafter, to continue to publish them at the various points at which additions or amendments were made to the terms of the articles.

106. The key statements from the Defendants' witnesses were signed between 9-13 July 2020, i.e. over 6 years after the events the witnesses were being asked to recall. Although each of the Defendants' witnesses was clearly honest, doing his/her best to recall events and genuinely trying to assist the court, it is unreal to expect any witness to be able to have any genuine recollection of events that took place so long ago. All the more so when there is such a dearth of contemporaneous documentation. It is surprising, to say the least, that the Defendants waited so long to proof witnesses whose evidence was so obviously important to each Defendant's defence of public interest. What each witness might have been able to recall, in September 2014, is now necessarily a matter of speculation, but it is a reasonable assumption that each witness's memory would have been better then than it was in July 2020, when statements for the proceedings were finally taken.

107. Mr Sloan confirmed that he had first been asked to provide an account of the events that led to the publication of the Independent Article early in the New Year of 2015. Mr Dawber could not really recall when he was first made aware that there had been a complaint by the Claimant, he thought that he first became aware of it in the year prior to the trial, although possibly it could have been earlier. Asked by Ms Page QC when he had first been asked to give his recollection of events leading up to publication of the Independent Article, Mr Dawber replied: "*I'm not sure. Within the last 12 months, I think*".

108. In his witness statement, Mr Green stated:

> "It is now more than 6 years after the article was published. Although I no longer have an independent recollection of what I was thinking or doing at the time of sending or receiving emails, it is fairly clear to me from reading them. I have a good recollection of the practices at The Independent at the time. I can state with confidence my beliefs as to the public interest elements of the article. My beliefs about public interest journalism have not changed since January 2014."

109. When cross-examined, Mr Green confirmed that the first detailed account he had given was when he provided his witness statement for the proceedings, in July 2020. Prior to that, he said that he had given an account of his general role following the Claimant's complaint in September 2014, but he had not made any statement at that time. Later in his cross-examination, Mr Green began his answers to several questions with the words, "*I would have…*" This indicated to me that he was speculating as to what had happened rather than providing his actual recollection. I told Mr Green that he needed to be careful to differentiate between what he actually remembered and what he was suggesting was likely to have been his response or reaction. Mr Green responded, candidly:

> "… in my witness statement when I mention early on that I have no independent recollection of what I was thinking or doing, that's effectively just me saying that I genuinely don't remember anything about that day, the days in question, the article in question, the pitches in question. Effectively, no detail whatsoever about, I mean, even that week."

Later in his cross-examination, Mr Green confirmed:

> "I don't remember anything about the preparation of this article, what went through my mind and why from the time at all… I have zero recollection, primary recollection, about anything about this story whatsoever until the point at which a complaint was received."

110. In his witness statement, Mr Johnson stated: "*I remember very little about the story. Having reviewed the emails… I do recall some details.*" Cross-examined about this, Mr Johnson confirmed that he had first reviewed the emails, in 2020, when he was approached to be a witness in the case, leading to his witness statement on 9 July 2020. This was also the first time that he had become aware about a complaint from the Claimant about the Independent Article. He added:

> "Before that – when I was first approached – I had no recollection of the case whatsoever, and the name Lachaux meant nothing to me. When I was sent the emails, then I did have a vague recollection of the day looking at the case of emailing Alastair Sloan, but obviously because it's such a long time ago, I have no

> recollection of any sort of conscious decisions or discussions… I was approached to be a witness. I remembered nothing about the case whatsoever, but on receiving the emails it did jog my memory slightly…"

111. In his witness statement, Mr Johnson explained his view of the public interest in the Independent Article in the following two paragraphs:

> "4. My recollection is that our – at least my – view was that the importance of the story lay in the alleged failure of the British government to help a woman facing an unfair trial due to systemic discrimination against women in the UAE, which could result in her going to prison…
>
> 5. From a point of view of principle, the primary role of journalism is to hold the executive to account. The main public interest in the story was this – the possible failure of the government to help a citizen facing an unfair trial abroad. It is the first duty of government to aid and protect citizens. So disclosure of a possible failure to do so is very much in the public interest. This, in my view, stands even if the person facing an unfair trial may be guilty or not telling the whole truth. In this case, the British authorities had no way of knowing whether Mrs Lachaux's allegations of domestic violence were true or not and that would not be relevant to the government's obligations to protect her from the consequences of a discriminatory legal system which was apparently not giving her a fair trial."

112. In cross-examination, Ms Page QC asked Mr Johnson whether, in light of his candid confirmation that he had no recollection of the events, these paragraphs of his witness statement were recollection or reconstruction. Mr Johnson confirmed that they were reconstruction. At the end of his evidence, I asked Mr Johnson whether he had a recollection of considering, at the time, whether publication of the article was in the public interest. Mr Johnson answered: "*I can't say that I specifically did do that*". He added: "*I can say that my email to Alastair [see [43] above] that the FCO not helping, it seems to imply that I did, or suggest that I did*".

113. In light of those answers, the cross-examination of Mr Johnson as to whether the public interest that he had identified in his witness statement was actually relevant to the article that had been published is not relevant, but I did not find Mr Johnson's answers to be at all convincing. Indeed, he gave the impression that he was arguing a case that had been devised by someone else and in respect of which he was neither confident nor wholly convinced.

114. When cross-examined, Ms Ross said that she had given an initial account of the events leading up to publication of the Standard Article in December 2014. She had not kept any records of the decision to publish and said that most communications at the time would have been verbal. When cross-examined, understandably, she could not recall details of what had taken place over seven years' ago.

115. Even in cases where there is an abundance of contemporaneous documents, such a long period, between the relevant events and the witness's evidence about them, leads to a recognised risk that a witness will speculate about or reconstruct events rather than recalling them. In what has become a frequently quoted judgment on this point, in ***Gestmin SGPS SA -v- Credit Suisse (UK) Ltd*** **[2013] EWHC 3560 (Comm)** Leggatt J said this under a heading "*Evidence based on recollection*":

[15] An obvious difficulty which affects allegations and oral evidence based on recollection of events which occurred several years ago is the unreliability of human memory.

[16] While everyone knows that memory is fallible, I do not believe that the legal system has sufficiently absorbed the lessons of a century of psychological research into the nature of memory and the unreliability of eyewitness testimony. One of the most important lessons of such research is that in everyday life we are not aware of the extent to which our own and other people's memories are unreliable and believe our memories to be more faithful than they are. Two common (and related) errors are to suppose: (1) that the stronger and more vivid is our feeling or experience of recollection, the more likely the recollection is to be accurate; and (2) that the more confident another person is in their recollection, the more likely their recollection is to be accurate.

[17] Underlying both these errors is a faulty model of memory as a mental record which is fixed at the time of experience of an event and then fades (more or less slowly) over time. In fact, psychological research has demonstrated that memories are fluid and malleable, being constantly rewritten whenever they are retrieved. This is true even of so-called 'flashbulb' memories, that is memories of experiencing or learning of a particularly shocking or traumatic event. (The very description 'flashbulb' memory is in fact misleading, reflecting as it does the misconception that memory operates like a camera or other device that makes a fixed record of an experience.) External information can intrude into a witness's memory, as can his or her own thoughts and beliefs, and both can cause dramatic changes in recollection. Events can come to be recalled as memories which did not happen at all or which happened to someone else (referred to in the literature as a failure of source memory).

[18] Memory is especially unreliable when it comes to recalling past beliefs. Our memories of past beliefs are revised to make them more consistent with our present beliefs. Studies have also shown that memory is particularly vulnerable to interference and alteration when a person is presented with new information or suggestions about an event in circumstances where his or her memory of it is already weak due to the passage of time.

[19] The process of civil litigation itself subjects the memories of witnesses to powerful biases. The nature of litigation is such that witnesses often have a stake in a particular version of events. This is obvious where the witness is a party or has a tie of loyalty (such as an employment relationship) to a party to the proceedings. Other, more subtle influences include allegiances created by the process of preparing a witness statement and of coming to court to give evidence for one side in the dispute. A desire to assist, or at least not to prejudice, the party who has called the witness or that party's lawyers, as well as a natural desire to give a good impression in a public forum, can be significant motivating forces.

[20] Considerable interference with memory is also introduced in civil litigation by the procedure of preparing for trial. A witness is asked to make a statement, often (as in the present case) when a long time has already elapsed since the relevant events. The statement is usually drafted for the witness by

> a lawyer who is inevitably conscious of the significance for the issues in the case of what the witness does nor does not say. The statement is made after the witness's memory has been "refreshed" by reading documents. The documents considered often include statements of case and other argumentative material as well as documents which the witness did not see at the time or which came into existence after the events which he or she is being asked to recall. The statement may go through several iterations before it is finalised. Then, usually months later, the witness will be asked to re-read his or her statement and review documents again before giving evidence in court. The effect of this process is to establish in the mind of the witness the matters recorded in his or her own statement and other written material, whether they be true or false, and to cause the witness's memory of events to be based increasingly on this material and later interpretations of it rather than on the original experience of the events.
>
> [21] It is not uncommon (and the present case was no exception) for witnesses to be asked in cross-examination if they understand the difference between recollection and reconstruction or whether their evidence is a genuine recollection or a reconstruction of events. Such questions are misguided in at least two ways. First, they erroneously presuppose that there is a clear distinction between recollection and reconstruction, when all remembering of distant events involves reconstructive processes. Second, such questions disregard the fact that such processes are largely unconscious and that the strength, vividness and apparent authenticity of memories is not a reliable measure of their truth.
>
> [22] In the light of these considerations, the best approach for a judge to adopt in the trial of a commercial case is, in my view, to place little if any reliance at all on witnesses' recollections of what was said in meetings and conversations, and to base factual findings on inferences drawn from the documentary evidence and known or probable facts. This does not mean that oral testimony serves no useful purpose – though its utility is often disproportionate to its length. But its value lies largely, as I see it, in the opportunity which cross-examination affords to subject the documentary record to critical scrutiny and to gauge the personality, motivations and working practices of a witness, rather than in testimony of what the witness recalls of particular conversations and events. Above all, it is important to avoid the fallacy of supposing that, because a witness has confidence in his or her recollection and is honest, evidence based on that recollection provides any reliable guide to the truth.

116. It is a remarkable feature of this case that, excluding emails, there are just two contemporaneous documents of any significance:

i) The first is a handwritten note made by Mr Sloan of an interview he had with Mr Yahiya. He had transcribed his notes – not altogether accurately – in 2020, shortly before providing his witness statement. He could not recall when the interview had taken place, but he thought it was possible that it would have been shortly before he submitted his pitch to the First Defendant. He said that he was keen to pitch the article as soon as possible. In his evidence, Mr Sloan stated that he thought he had made other notes for the article, but none of the others had been preserved.

ii) The second is a document containing some background information on the article together with some handwritten notes made by Ms Butter (see [54] above).

Mr Sloan believed that he may have had some emails with people that he had contacted when drafting the article, but these had been lost at some point, he thought, in 2017. The loss of those emails – during the currency of the litigation – is surprising.

117. There are no contemporaneous documents that record anyone, at either Defendant, for example, addressing the question whether publishing the Articles in the terms they appeared, with the information that was available to the Defendants, was in the public interest. Even more surprising, in this case, is that fact that there are no documents that record or evidence Mr Gore's decisions that it was in the public interest to continue to publish the articles (albeit with amendments or additions). That was so even after the letters of complaint had raised a direct challenge, in September 2014, to whether the Defendants had any prospect of demonstrating that there was a reasonable belief that publication of the original articles was in the public interest.

118. When he gave evidence, Mr Gore was asked by Ms Page QC how, in 2014, editors at the Defendants' titles would be able to demonstrate fully that they had reasonably believed that publication of a particular article was in the public interest. Mr Gore answered:

> "We didn't have a formal policy as to how that would be demonstrated and in the same way that the Press Complaints Commission considered cases on their own merit, we would regard it as an important principle but one that could be demonstrated in a variety of ways. So it might be that there may be a note of some of the conversation taking place, it may be that there would be a recollection of conversations taking place, but we did not have a formal policy that X and Y must happen on any scenario where there was a question mark over public interest matters."

119. My immediate reaction on hearing that answer was that this demonstrated a lax and, frankly, amateurish approach to the recording of decisions of potentially critical importance. The defence of both Defendants cannot, in this case, be demonstrated "*in a variety of ways*". The defences depend fundamentally and, in the absence of any supporting documents, critically upon the recollection of witnesses, some of whom have candidly accepted that they have no recollection of the relevant events. Upon reflection, I have asked myself whether it is unrealistic for a Court to expect documents to be available that record (or at least shed some light on) decisions taken as to what was identified, at the time, as the public interest justification for publication? I do not think it is. In other areas, where professionals are asked to account for events that have happened and decisions they have taken, the Courts are used to seeing contemporaneous records. For example, doctors, nurses, teachers, police officers, lawyers, surveyors, dentists, accountants, opticians, and architects routinely take notes and keep records of their professional lives; information received, advice given, decisions made, and actions taken. Partly, this record keeping assists them to do their respective jobs, but one of the reasons that these records are kept is because the professional may be called upon to account for his/her decisions or actions – to superiors, a regulator or even in litigation – and the recognition that memory alone may be an unreliable tool upon which to rely.

120. Perhaps more importantly, a requirement that journalists and those in professional publishing organisations should be able to demonstrate, not only that they reasonably believed that publication would be in the public interest, but also how and with whom this was established at the time, is not an unworkable, unreasonable, or unachievable objective set by lawyers or the Court. It is the standard set at the time by the PCC in the industry Code of Practice; a "*benchmark*" that was set by the print media's own regulator at the time as the "*cornerstone of the system of self-regulation*". As Lord Nicholls said of the old *Reynolds* defence: "*The common law does not seek to set a higher standard than that of responsible journalism, a standard the media themselves espouse*": ***Reynolds*** (at 202E). Although the statutory test is no longer "*responsible journalism*", the principle, underpinning Lord Nicholls' observation, remains valid.

121. In ***Sicri -v- Associated Newspapers Ltd*** **[2021] 4 WLR 9**, Warby J considered the "*ethics of journalism*" and the Editors' Code's requirement that editors should be able to demonstrate that they reasonably believed that a publication was in the public interest. ***Sicri*** was a misuse of private information case, but I consider that the Judge's observations are equally applicable to consideration of a s.4 defence in a defamation case. Indeed, unless there is a clear reason to set different standards, the law should strive to achieve a level of coherence between the publication torts.

> [121] It does seem to me, however, that reliable evidence of the actual thought-processes of editorial decision-makers is capable of being probative in a number of ways. It could help the Court to identify whether there was a rational basis on which the public interest might be thought to justify disclosure of the disputed information. It could bolster the defendant's case about the decision actually made. A publisher might be able to adduce evidence from editors or others, with experience and expertise not possessed by the Court, to explain and prove (for instance) how articles without names attract less interest from readers. And evidence of the editorial process could clearly go to the questions of whether (in domestic law) the defendant's conduct matched the standards of a "relevant privacy code" and was therefore (in the language of Strasbourg) "in accordance with the ethics of journalism."
>
> [122] I must beware of an overly textual analysis of the Code, given its preamble. But some things about the letter and the spirit of provisions cited above seem clear. A distinctive feature is that the Code requires proof that the public interest was actually considered: it places the onus of proof on a publisher, to "demonstrate" certain things. The provisions cited recognise that the question of whether an interference with privacy is justified is an objective one ("exceptions … where they can be *demonstrated to be* in the public interest"). At the same time, they identify a "need" for editors to (a) "demonstrate" that they believed that publication would serve, and be proportionate to, the public interest (b) "explain" how they reached that decision "at the time"; and (c) "demonstrate" that their belief was a reasonable one. There is some comparison to be drawn with the journalism exemption in data protection law: see ***Rudd -v- Bridle*** **[2019] EWHC 893 (QB)** [78]. It is not easy to see how the defendant could make good its case, that the claimant's private information was published in accordance with the ethics of journalism, if the criteria prescribed by the Code are not shown to be met.

122. Of course, the Court has no power to require a journalist – or any other professional – to maintain records. But, as the burden of establishing a public interest defence under s.4 Defamation Act 2013 lies upon the defendant, a defendant seeking to prove that s/he reasonably believed that publishing the statement complained of was in the public interest is likely to find that the prospects of success are enhanced by being able to produce contemporaneous records of the decision(s) taken. Leggatt J's observations about memory of beliefs being particularly susceptible to decay over time (***Gestmin*** [18]) are likely to be equally relevant in publication cases in which a defendant's belief that publication was in the public interest is an issue to be resolved.

123. Defendants seeking to rely upon such a belief – whether in support of a s.4 defence or otherwise – would be well advised to ensure that they are able to demonstrate that they reasonably believed that publication would be in the public interest and how, and with whom, that was established at the time. My confidence that the Court is not setting unrealistic targets is also somewhat fortified by the fact that the current Codes of both IPSO and IMPRESS both impose substantially the same requirements as the old PCC Code of Practice (see [25] above). The IMPRESS Code, particularly, contains a very clear explanation why it is good practice to retain contemporaneous documents that record important decisions about the public interest justification for publication. As an explanation of the importance of contemporaneous documents, it can hardly be bettered.

124. The Court may ultimately disagree with the journalist's assessment that it was in the public interest to publish, but contemporaneous documents will at least assist the journalist in being able to demonstrate his/her thought processes at the time. In relevant cases, evidence of that process is also likely to be relevant to, even if not necessarily determinative of, the Court's assessment of editorial judgment under s.4(4).

F: s.4 Defamation Act 2013 – publication on a matter of public interest

125. Prior to the Defamation Act 2013, one of the ways in which English defamation law struck the balance between freedom of expression and reputation was the *Reynolds* defence and the requirements of 'responsible journalism'. In ***Bonnick -v- Morris*** **[2003] 1 AC 300** [23], Lord Nicholls gave this summary of the public interest defence:

> "Stated shortly, the *Reynolds* privilege is concerned to provide a proper degree of protection for responsible journalism when reporting matters of public concern. Responsible journalism is the point at which a fair balance is held between freedom of expression on matters of public concern and the reputations of individuals. Maintenance of this standard is in the public interest and in the interests of those whose reputations are involved. It can be regarded as the price journalists pay in return for the privilege. If they are to have the benefit of the privilege journalists must exercise due professional skill and care."

126. The, now familiar, ten illustrative factors[1], identified by Lord Nicholls in ***Reynolds***, stood as a helpful guide to assist in assessing whether the defendant had demonstrated

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[1] **[2001] 2 AC 127, 205**:
"1. The seriousness of the allegation. The more serious the charge, the more the public is misinformed and the individual harmed, if the allegation is not true.
2. The nature of the information, and the extent to which the subject matter is a matter of public concern.

due responsibility sufficient, in all the circumstances and in the public interest, to deprive the claimant of a remedy for the damage to his reputation caused by the publication.

127. The public interest defence in defamation has now been placed on a statutory footing. Section 4 of the Defamation Act 2013 provides:

> **4. Publication on matter of public interest**
>
> (1) It is a defence to an action for defamation for the defendant to show that—
>
> (a) the statement complained of was, or formed part of, a statement on a matter of public interest; and
>
> (b) the defendant reasonably believed that publishing the statement complained of was in the public interest.
>
> (2) Subject to subsections (3) and (4), in determining whether the defendant has shown the matters mentioned in subsection (1), the court must have regard to all the circumstances of the case.
>
> (3) If the statement complained of was, or formed part of, an accurate and impartial account of a dispute to which the claimant was a party, the court must in determining whether it was reasonable for the defendant to believe that publishing the statement was in the public interest disregard any omission of the defendant to take steps to verify the truth of the imputation conveyed by it.
>
> (4) In determining whether it was reasonable for the defendant to believe that publishing the statement complained of was in the public interest, the court must make such allowance for editorial judgement as it considers appropriate.
>
> (5) For the avoidance of doubt, the defence under this section may be relied upon irrespective of whether the statement complained of is a statement of fact or a statement of opinion.
>
> (6) The common law defence known as the Reynolds defence is abolished.

128. The abolition of the *Reynolds* defence – by s.4(6) – means that the test of "responsible journalism" has been replaced by the requirements of the section. The key authorities

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3. The source of the information. Some informants have no direct knowledge of the events. Some have their own axes to grind, or are being paid for their stories.
4. The steps taken to verify the information.
5. The status of the information. The allegation may have already been the subject of an investigation which commands respect.
6. The urgency of the matter. News is often a perishable commodity.
7. Whether comment was sought from the plaintiff. He may have information others do not possess or have not disclosed. An approach to the plaintiff will not always be necessary.
8. Whether the article contained the gist of the plaintiff's side of the story.
9. The tone of the article. A newspaper can raise queries or call for an investigation. It need not adopt allegations as statements of fact.
10. The circumstances of the publication, including the timing."

on the proper interpretation of s.4 are ***Economou -v- de Freitas*** **[2019] EMLR 7**; ***Doyle -v- Smith*** **[2019] EMLR 15**; ***Turley -v- Unite the Union*** **[2019] EWHC 3547 (QB)**; and the important Supreme Court decision in ***Serafin -v- Malkiewicz*** **[2020] 1 WLR 2455**.

129. There are three issues for the court to determine under s.4(1):

i) was the statement complained of, or did it form part of, a statement on a matter of public interest? If so,

ii) did the defendant believe that publishing the statement complained of was in the public interest? If so,

iii) was that belief reasonable?

- ***Economou*** [87].

130. The first issue is an objective question for the Court not a matter of the subjective judgment of a journalist or editor: ***Doyle*** [64] and see also discussion in ***Sicri*** [111]-[119]. Matters of public interest are of potentially wide compass, but exclude matters which are "*personal and private, such that there is no public interest in their disclosure*": ***Doyle*** [69] quoting ***Reynolds -v- Times Newspapers Ltd*** **[2001] 2 AC 127**. The reference to "*the statement complained of*" means "*the words complained of*" not "*the (single) defamatory imputation they convey*": ***Economou*** [92]-[93]. Lord Hoffmann's observations in ***Jameel -v- Wall Street Journal Europe Sprl*** **[2007] 1 AC 359** [51] remain important:

> "If the article as a whole concerned a matter of public interest, the next question is whether the inclusion of the defamatory statement was justifiable. The fact that the material was of public interest does not allow the newspaper to drag in damaging allegations which serve no public purpose. They must be part of the story. And the more serious the allegation, the more important it is that it should make a real contribution to the public interest element in the article."

131. The second issue, under s.4, concerns the defendant's actual state of mind at the time of publication: ***Doyle*** [75]. This element of the defence is not established by demonstrating that a reasonable person *could* have believed that the publication was in the public interest: ***Turley*** [138(vii)]. The defendant must prove that s/he *did* believe that publication was in the public interest. A failure to do so will mean the defence will fail: see e.g. ***Doyle*** [76]; ***Turley*** [149].

132. It is the third issue that is likely to be the major point of contention whenever reliance is placed upon a s.4 defence.

133. As is clear from the terms of s.4(2), and emphasised both in ***Serafin*** and ***Economou***, an assessment of the public interest defence under s.4 requires a consideration of all the circumstances. In ***Economou*** [110], Sharp LJ explained:

> "… This defence is not confined to the media, which has resources and other support structures others do not have. Section 4 requires the court to have regard to all the circumstances of the case when determining the all-important question arising under section 4(1)(b): it says the court must have regard to all the

> circumstances of the case in determining whether the defendant has shown that he or she reasonably believed that publishing the statement complained of was in the public interest. In my judgment, all the circumstances of the case must include the sort of factors carefully identified by the judge, including, importantly, the particular role of the defendant in question. The statute could have made reference to the *Reynolds* factors in this connection, but it did not do so. That is not to say however, that the matters identified … may not be relevant to the outcome of a public interest defence, or that, on the facts of the individual case, the failure to comply with one or some of the factors, may not tell decisively against a defendant. However, even under the *Reynolds* regime, as Lord Nicholls made clear, the weight to be given to those factors, and any other relevant factors, would vary from case to case. As with *Reynolds* therefore, with its emphasis on practicality and flexibility, all will depend on the facts."

134. It is also clear from that passage, as endorsed by Lord Wilson in ***Serafin*** [69], that providing they are not treated as any sort of 'checklist', the *Reynolds* factors will remain potentially relevant when assessing whether a defendant's belief that publication was in the public interest was objectively reasonable. Lord Wilson traced the legislative history of s.4 through the post-*Reynolds* authorities in [57] to [59], and observed in [60]:

> "In [***Flood -v- Times Newspapers Ltd*** **[2012] 2 AC 273**] ..., the defendant published an article taken to mean that there were reasonable grounds to suspect that the claimant, a police officer, had corruptly taken bribes. The allegation was false. This court held that the defendant nevertheless had a valid defence of public interest. Lord Phillips of Worth Matravers, the President of the court, said at [26] that in that case analysis of the defence required particular reference to two questions, namely public interest and verification; at [27] that it was misleading to describe the defence as privilege; at [78], building on what Lord Hoffmann had said in the ***Jameel*** case at [62], that the defence normally arose only if the publisher had taken reasonable steps to satisfy himself that the allegation was true; and at [79] that verification involved both a subjective and an objective element in that the journalist had to believe in the truth of the allegation but it also had to be reasonable for him to have held the belief. Lord Brown at [113] chose to encapsulate the defence in a single question. "Could", he asked, "whoever published the defamation, given whatever they knew (and did not know) and whatever they had done (and had not done) to guard so far as possible against the publication of untrue defamatory material, properly have considered the publication in question to be in the public interest?". Lord Mance at [137], echoing what Lord Nicholls had said in the ***Reynolds*** case at p.205, stressed the importance of giving respect, within reason, to editorial judgement in relation not only to the steps to be taken by way of verification prior to publication but also to what it would be in the public interest to publish; and at [138] Lord Mance explained that the public interest defence had been developed under the influence of the principles laid down in the European Court of Human Rights."

135. As Lord Wilson noted ([66]), the Explanatory Notes to the Defamation Act 2013 stated that the intention behind s.4 was to: "*reflect the common law as recently set out in the* ***Flood*** *case and in particular the subjective and objective elements of the requirement now both contained in subsection 1(b)*".

136. In [60], Lord Wilson referred to Lord Brown's question from ***Flood***. To similar effect, in ***Economou*** **[2017] EMLR 4** [241], Warby J held:

> "I would consider a belief to be reasonable for the purposes of section 4 only if it is one arrived at after conducting such inquiries and checks as it is reasonable to expect of the particular defendant in all the circumstances of the case".

This statement was approved by Sharp LJ in ***Economou*** [101] and by the Supreme Court in ***Serafin*** [67]. See also Warby J's observations as to reasonableness of belief in ***Economou*** [239].

137. The requirement in s.4(3), in cases of neutral reportage, that the Court should disregard any omission by the defendant to take steps to verify the truth of the imputation conveyed by the statement complained of, is an implicit recognition that efforts to verify will usually be regarded as an important factor in the assessment of the reasonableness of a defendant's belief that publication was in the public interest. That is not to say that a failure to verify will *necessarily* lead to the s.4 defence being rejected; everything depends upon the particular circumstances of the case. However, recognition of the general importance – outside neutral reportage – of steps taken to verify defamatory allegations is consistent with both domestic and Convention jurisprudence.

138. In ***Flood***, Lord Phillips explained why neutral reportage justified a journalist being relieved from the normal obligation to verify:

> [77] … Reportage is a special, and relatively rare, form of *Reynolds* privilege. It arises where it is not the content of a reported allegation that is of public interest, but the fact that the allegation has been made. It protects the publisher if he has taken proper steps to verify the making of the allegation and provided that he does not adopt it. ***Jameel -v- Wall Street Journal Europe Sprl* [2007] 1 AC 359** was analogous to reportage because it was the fact that there were names of substantial Saudi Arabian companies on the black list that was of public interest, rather than the possibility that there might be good reason for the particular names to be listed. Just as in the case of reportage, the publishers did not need to verify the aspect of the publication that was defamatory.
>
> [78] The position is quite different where the public interest in the allegation that is reported lies in its content. In such a case the public interest in learning of the allegation lies in the fact that it is, or may be, true. It is in this situation that the responsible journalist must give consideration to the likelihood that the allegation is true. *Reynolds* privilege absolves the publisher from the need to justify his defamatory publication, but the privilege will normally only be earned where the publisher has taken reasonable steps to satisfy himself that the allegation is true before he publishes it. Lord Hoffmann put his finger on this distinction in ***Jameel*** [62] when he said
>
> > "In most cases the *Reynolds* defence will not get off the ground unless the journalist honestly and reasonably believed that the statement was true, but there are cases ('reportage') in which the public interest lies simply in the fact that the statement was made, when it may be clear that the publisher does not subscribe to any belief in its truth."
>
> [79] Thus verification involves both a subjective and an objective element. The responsible journalist must satisfy himself that the allegation that he

> publishes is true. And his belief in its truth must be the result of a reasonable investigation and must be a reasonable belief to hold. What then does the responsible journalist have to verify in a case such as this, and what does he have to do to discharge that obligation? If this were a *Chase* level 1 case he would have to satisfy himself, on reasonable grounds, that the claimant had in fact been guilty of corruption. His defence would not "get off the ground" unless he reasonably believed in the claimant's guilt. This is not, however, a *Chase* level 1 case...

139. In ***Axel Springer AG -v- Germany*** **[2012] EMLR 15** [82], the Grand Court held, under the heading "*Limits on freedom of expression*":

> "However, art.10(2) of the Convention states that freedom of expression carries with it 'duties and responsibilities', which also apply to the media even with respect to matters of serious public concern. These duties and responsibilities are liable to assume significance when there is a question of attacking the reputation of a named individual and infringing the 'rights of others'. Thus, special grounds are required before the media can be dispensed from their ordinary obligation to verify factual statements that are defamatory of private individuals. Whether such grounds exist depends in particular on the nature and degree of the defamation in question and the extent to which the media can reasonably regard their sources as reliable with respect to the allegations (see ***Pedersen -v- Denmark*** **(2006) 42 EHRR 24** [78], and ***Tønsbergs Blad AS and Haukom -v- Norway*** **(2007) 46 EHRR 40** [89])."

140. Similarly, from ***Times Newspapers Ltd -v- United Kingdom*** **[2009] EMLR 14** ("***Loutchansky***"):

> [41] The Court observes that the most careful of scrutiny under art.10 is required where measures or sanctions imposed on the press are capable of discouraging the participation of the press in debates on matters of legitimate public concern (***Bladet Tromsø -v- Norway*** **(2000) 29 EHRR 125** [64]). The Court further recalls that particularly strong reasons must be provided for any measure limiting access to information which the public has the right to receive (see ***Timpul Info-Magazin and Anghel -v- Moldova*** (42864/05) Unreported November 27, 2007 [31]).
>
> [42] However, the Court reiterates that art.10 does not guarantee a wholly unrestricted freedom of expression to the press, even with respect to press coverage of matters of serious public concern. When exercising its right to freedom of expression, the press must act in a manner consistent with its duties and responsibilities, as required by art.10(2). These duties and responsibilities assume particular significance when, as in the present case, information imparted by the press is likely to have a serious impact on the reputation and rights of private individuals. Furthermore, the protection afforded by art.10 to journalists is subject to the proviso that they act in good faith in order to provide accurate and reliable information in accordance with responsible journalism (***Fressoz -v- France*** **(2001) 31 EHRR 2** [54] and ***Bladet Tromsø*** [65]).

141. A key feature of Mr Price QC's submissions is that the articles were reporting, rather than adopting, the allegations made by Afsana. In the case of the Standard Article, he relies particularly on the fact that there was an express statement at the end of

paragraph [4] that the allegations of domestic violence had not been tested in court and were denied by the Claimant. Rightly, he has referred to the well-known statements of principle, from the jurisprudence of the European Court of Human Rights, emphasising the importance in not fettering the media's ability to report on matters of public interest. By way of recent example from the ECtHR's decisions, in ***Ólafsson -v- Iceland*** **(2018) 67 EHRR 19** [56] (with footnotes omitted):

> "The Court further reiterates that a general requirement for journalists systematically and formally to distance themselves from the content of a quotation that might insult or provoke others or damage their reputation is not reconcilable with the press's role of providing information on current events, opinions and ideas, and that 'punishment of a journalist for assisting in the dissemination of statements made by another person in an interview would seriously hamper the contribution of the press to discussion of matters of public interest and should not be envisaged unless there are particularly strong reasons for doing so'."

142. This principle cannot be seen in isolation and needs to be properly understood in the context of Convention jurisprudence (particularly the importance attached, usually, to verifying defamatory allegations recognised in ***Axel Springer*** and ***Loutchansky***). Seen in that context, it does not support a contention that, where a publisher is reporting allegations made by others, which can damage the reputation of another, a publisher is relieved of the onus to observe what the ECtHR has referred to as the "*ordinary journalistic obligations*": ***Ólafsson*** [57].

143. Publishers have at their disposal a variety of reporting techniques. For example, those who are unable or unwilling to take steps to verify defamatory allegations, and who wish potentially to rely upon a public interest defence to defend their publication, may well have to adopt a reporting technique that reduces the overall defamatory impact (for example the inclusion of statements that are effective in indicating that the publisher is not adopting the allegations). Alternatively (where the circumstances permit), the publisher might be able to present the allegations as part of an accurate and impartial account of a dispute to which the claimant was a party. In that latter respect, although the publisher is likely, by reason of s.4(3), thereby to be relieved of the need to take steps to *verify* the allegations, s/he will nevertheless be required to *obtain* and publish the other side of the dispute. These are examples to demonstrate the sort of issues that a publisher is likely to have to consider when deciding what technique of reporting is chosen. Difficult questions of judgment may arise, for example, the extent to which it is necessary to include defamatory allegations against others in an article which otherwise makes a significant contribution to a matter of public interest. If a journalist or publisher can demonstrate that s/he has carefully considered the necessity for, and proportionality of, the harm to the reputations of those included in the publication, then a Court is likely to accord due weight to that assessment. Ultimately, in each case where a defendant relies upon a defence under s.4, the Court has to make an assessment of all the circumstances and to make due allowance for proven exercise of editorial judgment.

144. Mr Price QC raised a novel argument as to the correct approach to a determination under s.4, albeit rather tucked away in a footnote in his opening written submissions. He referred to the Court of Appeal decision in ***Chesterton Global Ltd -v- Nurmohamed*** **[2018] ICR 837**. The case concerned the proper interpretation of s.43B Public Interest Disclosure Act 1998 (as amended). The section defined a 'qualifying disclosure' as:

> "… any disclosure of information which, in the reasonable belief of the worker making the disclosure, is made in the public interest and tends to show one or more of the following - (a) that a criminal offence has been committed, is being committed or is likely to be committed, (b) that a person has failed, is failing or is likely to fail to comply with any legal obligation to which he is subject, (c) that a miscarriage of justice has occurred, is occurring or is likely to occur, (d) that the health or safety of any individual has been, is being or is likely to be endangered, (e) that the environment has been, is being or is likely to be damaged, or (f) that information tending to show any matter falling within any one of the preceding paragraphs has been, is being or is likely to be deliberately concealed."

145. The section therefore required consideration of (a) whether the worker believed, at the time he was making it, the disclosure was in the public interest; and (b) whether, if so, that belief was reasonable: [27]. Mr Price QC submits that this is very similar to the approach that the Court adopts to s.4. As to the assessment of whether the belief was reasonable, Underhill LJ said this:

> [28] … [E]lement (b) in that exercise requires the tribunal to recognise, as in the case of any other reasonableness review, that there may be more than one reasonable view as to whether a particular disclosure was in the public interest; and that is perhaps particularly so given that that question is of its nature so broad-textured. The parties in their oral submissions referred both to the "range of reasonable responses" approach applied in considering whether a dismissal is unfair under Part X of the 1996 Act and to the "Wednesbury approach" (***Associated Provincial Picture Houses Ltd -v- Wednesbury Corpn*** **[1948] 1 KB 223**) employed in (some) public law cases. Of course we are in essentially the same territory, but I do not believe that resort to tests formulated in different contexts is helpful. All that matters is that the tribunal should be careful not to substitute its own view of whether the disclosure was in the public interest for that of the worker. That does not mean that it is illegitimate for the tribunal to form its own view on that question, as part of its thinking – that is indeed often difficult to avoid – but only that that view is not as such determinative.
>
> [29] … [T]he necessary belief is simply that the disclosure is in the public interest. The particular reasons why the worker believes that to be so are not of the essence. That means that a disclosure does not cease to qualify simply because the worker seeks, as not uncommonly happens, to justify it after the event by reference to specific matters which the tribunal finds were not in his head at the time he made it. Of course, if he cannot give credible reasons for why he thought at the time that the disclosure was in the public interest, that may cast doubt on whether he really thought so at all; but the significance is evidential not substantive. Likewise, in principle a tribunal might find that the particular reasons why the worker believed the disclosure to be in the public interest did not reasonably justify his belief, but nevertheless find it to have been reasonable for different reasons which he had not articulated to himself at the time: all that matters is that his (subjective) belief was (objectively) reasonable.
>
> [30] … [W]hile the worker must have a genuine (and reasonable) belief that the disclosure is in the public interest, that does not have to be his or her

> predominant motive in making it: otherwise, as pointed out at para 17 above, the new sections 49(6A) and 103(6A) would have no role. I am inclined to think that the belief does not in fact have to form any part of the worker's motivation—the phrase " in the belief" is not the same as "motivated by the belief"; but it is hard to see that the point will arise in practice, since where a worker believes that a disclosure is in the public interest it would be odd if that did not form at least some part of their motivation in making it.
>
> [31] Finally by way of preliminary, although this appeal gives rise to a particular question which I address below, I do not think there is much value in trying to provide any general gloss on the phrase "in the public interest". Parliament has chosen not to define it, and the intention must have been to leave it to employment tribunals to apply it as a matter of educated impression. Although Mr Reade in his skeleton argument referred to authority on the *Reynolds* defence (***Reynolds -v- Times Newspapers Ltd* [2001] 2 AC 127**) in defamation and to the Charity Commission's guidance on the meaning of the term "public benefits" in the Charities Act 2011, the contexts there are completely different. The relevant context here is the legislative history explained at paras 10–13 above. That clearly establishes that the essential distinction is between disclosures which serve the private or personal interest of the worker making the disclosure and those that serve a wider interest…

146. Based on this authority, Mr Price QC submitted that the Court may regard a defendant's belief to be wrong, but nevertheless reasonably held, alternatively, the Court may regard the belief to be reasonably held, wholly or partly, on grounds different from those contemplated by the defendant. He argues that all that matters is that the defendant's (subjective) belief was (objectively) reasonable. Extending this argument, Mr Price contended that – although the belief must be judged by reference to the information known to the defendant at the time of publication – ***Economou*** [139(5)] – the Court may take into account factors, arising from that information but not consciously taken into account by the defendant, to find the belief to be reasonable. Further, the defendant should be entitled to rely on specific examples of a general fact known at the time of publication, even if they were not in the defendant's mind at the time. Mr Price QC argued that such examples can be relied upon in support of an honest opinion defence and "*there is no reason, in principle, for taking a stricter approach in relation to s.4*".

147. This argument is novel, but I am not persuaded that it is correct. First, the principles underpinning the defence of honest opinion are very different from the public interest defence. Second, as is clear from [31] in the ***Chesterton*** decision, the interpretation given to s.47B by the Court of Appeal was in the context of that particular statute. The policy objectives underlying the two statutes are very different. The defence now embodied in s.4 Defamation Act 2013 also has its own history under the common law. It was meant to represent the defence as stated in ***Flood***, "*in particular the subjective and objective elements of the requirement now both contained in subsection 1(b)*" (see [135] above). Mr Price QC's argument, if adopted, would lead to a significant shift in the parameters of the defence. It would effectively remove the subjective element of s.1(b) and leave only an objective assessment of whether the belief was reasonable. I reject that argument.

148. Finally, and in any event, I am satisfied that the Supreme Court in ***Serafin***, has endorsed the approach from ***Flood*** and given its express approval to Warby J's formulation of the correct approach to the assessment of s.4(1)(b) (see [136] above). I am bound to apply the law as stated by the Supreme Court, but I also consider it to be correct. I state my conclusion as to whether Mr Price QC's argument, based on ***Chesterton Global Ltd*** would make any difference to the outcome in this case below (see [206]).

149. I should deal, finally, with the potential relevance to the issues I have to decide of the relevant Codes of Conduct; the PCC Commission Code of Conduct and the Defendants' Code (see [23]-[26] above).

150. In his closing submissions, Mr Price QC submitted that the Claimant should not be entitled to rely upon the provisions of the relevant Codes, or any alleged breach of them, because this point had not been taken by the Claimant in his Reply. He argues that: "*it is unfair for a journalist to be confronted with an unpleaded criticism of their conduct or the newspaper's practices in the witness box.*" It may not have been a point taken in the Reply, but Ms Page QC included submissions on the Codes in her opening submissions, both written and oral. In his opening submissions, Mr Price QC said this about the Claimant's reliance upon the Codes:

> "… because the PCC code has come up… I just wanted to make the point that the clause in relation to public interest, which also includes the demonstration that it's been considered, is linked to specific elements of the code, which is privacy, children, harassment and subterfuge. That's what it's tied to. There's not a general obligation to demonstrate consideration of the public interest in any other. Similarly – and this is a matter that came up in the Supreme Court in Serafin – there is no obligation under the PCC, IPSO, or in the Press Code to invite comment from the claimants; there's simply an obligation to take care to ensure accuracy. So the [Defendants' Code], to which your Lordship was taken, actually goes beyond that and has a specific provision. My learned friend said that my clients hadn't pleaded in the defence that they had complied with the code. I should also make the point that the claimant hasn't pleaded in the reply that the defendants have breached any code. That's all I was proposing to say about the code -- sorry, one further thing. The Ofcom, the Broadcaster's code, they do have obligation to invite comment, in contrast to the print media."

151. Nothing more was said about what I might call the 'pleading point' and, in due course, Ms Page QC cross-examined several witnesses about the Defendants' Code, without objection from Mr Price QC.

152. Mr Price QC helpfully provided a copy of written submissions provided by the Media Lawyers Association ("MLA"), as intervenors, to the Supreme Court in ***Serafin***. The MLA had submitted that, in contrast with Human Rights Act 1998 and the Data Protection Act 2018, Parliament had not included, in s.4 Defamation Act 2013, a specific direction that the Court should consider any relevant code of practice. Nevertheless, the MLA accepted that, since s.4(2) required the Court to have regard to "*all the circumstances*", that would include any relevant code of practice. In his closing submissions, Mr Price QC has however suggested:

> "In order for the issue to be properly addressed, reliance on the code, by the claimant or defendant, would need to be pleaded and subjected to the standard litigation process. Consideration would include the purpose and interpretation of

the code in the context of the circumstances of the case and ascertainment of the relevant facts."

153. Mr Price QC did not develop this point in his oral submissions, but I am not convinced that the objection has any substance. The Defendants' Code is not a difficult document to understand. It was promoted to the public generally as embodying the Defendants' commitment to high standards and how each Defendant expects its staff to meet them. I do not know what subjecting it to the "*standard litigation process*" would be likely to have produced by way of further relevant material. The purpose of the Defendants' Code is expressly stated in the document itself. Mr Price QC has not identified what further "*relevant facts*" might have been obtained had the Claimant included reliance on the Defendants' Code in his Reply.

154. In my judgment both the PCC Code of Conduct and the Defendants' Code are potentially relevant to the issues I have to decide under s.4. My reasoning is similar to that of Warby J in ***Sicri*** [111]-[122]. Ultimately, the decision on whether a defendant's belief that publishing the statement complained of was in the public interest was reasonable is an objective question for the Court. However, a relevant code of conduct has a potential bearing in two key respects.

i) First, if a defendant has complied with the provisions of a relevant code, it seems to me that s/he is entitled to rely upon that fact as being a factor supporting the objective reasonableness of the belief that publication was in the public interest. Correspondingly, a failure to comply with a relevant code of conduct, depending on the seriousness of the breach, its consequences, and the explanation for it, may also be relevant to the assessment of the reasonableness of the belief. I agree with the MLA's submissions to the Supreme Court that, under s.4(2), the Court must have regard to all the circumstances. Adherence to a regulatory code plainly may be a relevant factor.

ii) Second, under s.4(4), the Court must make such allowance for editorial judgment as it considers appropriate. For similar reasons, whilst remaining an objective assessment, the Court is likely to afford greater allowance to editorial judgment if it is shown to have been exercised in a process in which there has been proven compliance with a relevant regulatory code.

155. For these reasons, insofar as Mr Price QC has raised an argument that the Court should not consider the relevant Codes, I reject that submission. Whilst it would have been better if reliance upon an alleged failure to comply with the Defendants' Code had been pleaded in the Reply, I do not consider that the Defendants, or their witnesses, have been prejudiced by the lack of inclusion of these points in the Claimant's statement of case. Each of the witnesses asked questions about provisions of the Defendants' Code, without objection, had no difficulty in dealing with them. Given that the Court must consider all the circumstances leading to publication, it would be wholly artificial to exclude from consideration the relevant Codes and the witnesses' evidence in respect of them. Ultimately, the point is academic. As will appear below, the principal breach of the Defendants' Code I have found relates to the failure to put the allegations to the Claimant prior to publication. As this is a basic tenet of good journalistic practice, I would still have taken into account the failure to contact the Claimant even had I excluded the Defendants' Code from the evidence I considered.

156. Finally, I should set out the principles that apply to continuing online publication. In ***Flood -v- Times Newspapers Ltd***, the trial Judge, Tugendhat J, had upheld a *Reynolds* defence for the original publication of an article, but rejected the continued online publication of the article – without amendment or qualification – from 5 September 2007, the date on which the defendant publisher was notified that the claimant had been cleared by the internal police inquiry: [2010] EMLR 8. The Court of Appeal allowed the claimant's appeal against the Judge's upholding of the *Reynolds* defence for the original publication and dismissed the defendant's appeal in respect of the continued online publication after 5 September 2007: [2011] 1 WLR 153. Subsequently, the Supreme Court reversed the Court of Appeal and restored Tugendhat J's upholding of the *Reynolds* defence for the original publication. It did not resolve the defendant's appeal in respect of the continuing publication beyond 5 September 2007, and, ultimately, the defendant withdrew its appeal on this point.

157. At first instance, Tugendhat J concluded [249]:

> "I reach the same conclusion in this case as the Court of Appeal reached in ***Loutchansky -v- Times Newspapers Ltd*** **[2002] QB 783** [79]. The failure to remove the article from the website, or to attach to the articles published on *The Times* website a suitable qualification, cannot possibly be described as responsible journalism. It is not in the public interest that there should continue to be recorded on the internet the questions as to the claimant's honesty which were raised in 2006, and it is not fair to him. It is not in the public interest for the reasons given by Lord Nicholls in ***Reynolds*** at p.201 cited in [207] above."

158. His decision, and this conclusion, was approved by Lord Neuberger MR in the Court of Appeal [77], who added [78]:

> "On the face of it, at least, that conclusion appears to be not merely one which the judge was entitled to reach: it was plainly right... If the original publication of the allegations made against DS Flood in the article on the website had been, as the judge thought, responsible journalism, once the report's conclusions were available, any responsible journalist would appreciate that those allegations required speedy withdrawal or modification. Despite this, nothing was done."

159. In my judgment, those principles continue to apply to a defence under s.4 Defamation Act 2013, with the necessary modifications to reflect the new statutory defence. If a defendant seeks to rely upon a s.4 defence for continuing publication of an article, then it will have to establish the constituent elements of the defence (identified in [129] above). That will require demonstration that the defendant believed that the continued publication was in the public interest and that the belief was reasonable. As with *Reynolds*, that will necessarily require consideration of any significant change in circumstances since the original publication.

G: The agreed issues for determination

160. The parties agreed that the Court should resolve the following issues in relation to question of the respective liability of each Defendant for original publication of the articles.

(A) The First Defendant

(1) Has the First Defendant shown that the statements complained of were on the alleged matters of public interest described in Paragraph 8.1 of the Re-Amended Defence?

(2) If it has, has the First Defendant shown that those matters were (rightly to be regarded as) matters of public interest for the purposes of s.4(1)(a)?

(3) If it has, has the First Defendant shown that it believed, through Christopher Green, that publishing the statements complained of was in the public interest?

(4) For this purpose, must Christopher Green be a person who took the decision to publish the statements complained of?

(5) If so, has the First Defendant shown that Christopher Green was such a person?

(6) If so, has the First Defendant shown that its belief was reasonable taking account of all the circumstances of the case?

(B) The Second Defendant

(1) Has the Second Defendant shown that the statements complained of were on the alleged matters of public interest described in Paragraph 8.1 of the Re-Amended Defence?

(2) If it has, has the Second Defendant shown that those matters were (rightly to be regarded as) matters of public interest for the purposes of s.4(1)(a)?

(3) If it has, has the Second Defendant shown that it believed through either Charlotte Ross or Susannah Butter (or both) that publishing the statements complained of was in the public interest?

(4) For this purpose, must Charlotte Ross and/or Susannah Butter be a person who took the decision to publish the statements complained of?

(5) If so, has the Second Defendant shown that either Charlotte Ross or Susannah Butter (or both) was such a person (or persons)?

(6) If so, has the Second Defendant shown that its belief was reasonable taking account of all the circumstances of the case?

161. The parties had also agreed, between themselves, further issues relating to the continuing publication of the articles online (i) after 22 September 2014; and (ii) after 2 March 2017. The first of these dates was when a letter of complaint was sent on behalf of the Claimant to the First Defendant. A complaint to the Second Defendant was sent on 23 September 2014 (see [92]-[93] above). The second date was when Mostyn J handed down judgment in the Family Proceedings (see [87] above). The issues the parties agreed that the Court should determine in relation to the continuing publication of the articles were:

Continuing online publication after 22 September 2014

(1) Have the Defendants shown that they believed, through Mr Gore, following receipt of the Claimant's letters of claim, that continuing publication of the online articles in their amended form was in the public interest?

(2) If so, have the Defendants shown that they reasonably believed that continuing publication of the online Articles in their amended form at this stage was in the public interest, taking account of all the circumstances of the case?

Continuing online publication after 2 March 2017

(3) Have the Defendants shown that they believed, through Mr Gore, following the handing down of Mostyn J's judgment dated 2 March 2017 and/or the withdrawal of their defences of truth, that continuing publication of the online Articles in their amended form was in the public interest?

(4) If so, have the Defendants shown that they reasonably believed that continuing publication of the online Articles in their amended form at this stage was in the public interest, taking account of all the circumstances of the case?

(1) Liability for publication of the original articles

(a) First Defendant

(i) Has the First Defendant shown that the statements complained of were on the alleged matters of public interest described in Paragraph 8.1 of the Re-Amended Defence?

(ii) If it has, has the First Defendant shown that those matters were (rightly to be regarded as) matters of public interest for the purposes of s.4(1)(a)?

162. I can take these two issues together. I am satisfied that the First Defendant has demonstrated that the Independent Article was or formed part of a statement on a matter of public interest.

163. Paragraph 8.1 of the Re-Amended Defence of the First Defendant advanced the case in respect of s.4(1)(a) as follows:

> "There is a general public interest in the application of foreign law and law enforcement to British nationals in circumstances where different standards apply and more particularly to the application of Sharia and Emirati law enforcement to the divorce and custody arrangements in a case of a British woman married in England to a non-Muslim European man working in the UAE, where the man chooses to commence proceedings in the UAE governed by Sharia, such law discriminating against women and failing to provide due process, as compared with English and European family law, including in relation to allegations of domestic violence and abuse, the extent to which the British government ought actively to protect a woman in such a position and whether there may be a reluctance on the part of the government to do so because of the proposed lucrative sale of military jets."

164. The Claimant has contended that the First Defendant has failed to demonstrate the first element of the s.4 defence and has advanced a sophisticated and detailed argument in an effort to detach the matters of public interest identified in Paragraph 8.1 from the Independent Article. The thrust of the submission is that the Independent Article did not concern all the various matters of public interest identified in the paragraph in the Re-Amended Defence. In my judgment, this is far too analytical. There may be some force in the submission that Paragraph 8.1 has itself been elaborately crafted so as to attempt to cover all aspects of the defamatory meaning that it had been found to bear, but that is not the correct approach either. With respect, I agree with Warby J's assessment, in ***Doyle -v- Smith***, that a defendant's case that a particular publication is on a matter of public interest should be capable of being stated shortly (see [130]). In my judgment, the Independent Article published information concerning Afsana Lachaux, a British Citizen, who had been (a) the subject of domestic violence at the hands of her husband; (b) mistreated by the UAE authorities, and who was facing an unfair trial in the UAE on a charge of kidnapping her own son; and who claimed that she had been badly let down by the UK authorities who did not want to jeopardise the sale of military jets. There may be other elements – for example the issue of whether a dimension of the unfairness that she faced was because she was a woman facing proceedings in an Islamic country – but I am quite satisfied that the Independent Article was a statement on a matter of public interest.

(iii) If it has, has the First Defendant shown that it believed, through Christopher Green, that publishing the statements complained of was in the public interest?

(iv) For this purpose, must Christopher Green be a person who took the decision to publish the statements complained of?

(v) If so, has the First Defendant shown that Christopher Green was such a person?

165. Again, I shall take these issues together. The separation of them appears to be somewhat artificial and, if this division serves a purpose, it is not clear to me what it is. The Claimant has not argued in its closing submissions that issues (iv) and (v) should be answered "no". There may have been other people who were involved in the decision to publish, for example Mr Moore, but (a) no evidence has been adduced in relation to Mr Moore's belief; (b) the First Defendant's s.4 defence is based solely on the belief of Mr Green; and (c) no suggestion was put to Mr Green in cross-examination that he was not a person who took the decision to publish the Independent Article. The real issue is (iii).

166. In my judgment, the First Defendant has failed to demonstrate that Mr Green believed that publication of the Article was in the public interest. On the evidence, Mr Green had "*zero recollection*" about details of the process that led to publication of the Independent Article (see [108]-[109] above). There is no other evidence bearing on the issue of whether Mr Green believed that publication of the Article was in the public interest. Mr Johnson, for example, cannot shed light on what Mr Green thought at the time. Mr Johnson was in the same position as Mr Green; he could not remember the relevant events either. Quite properly, when he was asked whether his account of the public interest in the Independent Article was recollection or reconstruction, he confirmed the latter.

167. In a written note provided after the final day of the trial, Mr Price QC submitted that the Defendants' witnesses had not been challenged on the relevant parts of their witness statements "*and the court is not in a position to reject any of it*".

168. For present purposes, I need only deal with that submission as it affects Mr Green, being the individual upon whose belief the First Defendant relies. It is correct that Ms Page QC did not suggest to him that, at the time of publication, he positively did not hold the beliefs as to the public interest in publication of the article that were advanced in his witness statement. However, it is not for the Claimant to prove that Mr Green did not hold the belief, it is for the First Defendant to prove that he did. Ms Page QC's cross-examination shortly, but effectively, demonstrated that Mr Green had no recollection of his state of belief at the time of publication of the Independent Article. Although he was not asked the same direct question, as was asked of Mr Johnson, as to whether his witness statement was recollection or reconstruction, it is clear that Mr Green's witness statement is just as much reconstruction on this point as Mr Johnson's was. I should be very clear. I am not criticising either of them. Frankly, a witness who claimed to have a detailed recollection, without any contemporaneous documents, of what s/he believed on a particular day 7 years ago would be unlikely to be credible. I am quite satisfied that both Mr Green and Mr Johnson have done the best they can to assist the Court. Neither has been anything other than completely honest. Their attempt to reconstruct what they thought at the time has been a genuine effort to assist the Court. Critically, however, it is not a recollection, and I cannot attach any weight to it. It is also unsupported by any other evidence. Ultimately, the burden of proof on this issue rests on the First Defendant. For the reasons I have explained, it has failed to discharge it.

(vi) If so, has the First Defendant shown that its belief was reasonable taking account of all the circumstances of the case?

169. In the light of my conclusion on the previous issue, I do not strictly need to determine this question. However, having heard the evidence at trial and the parties' submissions, I consider that I should state my conclusions on this issue as well in case my decision on the previous issue were to be reversed.

170. In my judgment, the First Defendant has failed to demonstrate that a belief that the publication of the Independent Article was in the public interest was reasonable (whether for the reasons stated in Mr Green's witness statement or otherwise).

171. The allegations made by the Independent Article against the Claimant were very grave. The harm to the Claimant arising from publication was both serious and obvious. Judged objectively, the source of the allegations, Afsana, was known to be locked in litigation with the Claimant, her estranged spouse, and was facing (according to the article) charges of kidnapping. At the very least, there was an obvious risk that she had an axe to grind. The matter was complicated further – in terms of any assessment of the reliability of her account – by the fact that it was being relayed by her son.

172. It does not appear that anyone at the First Defendant made any real assessment of the credibility of Afsana's allegations, but their ability to do so would have been hampered by the lack of any contact with her. None of those involved with publication of the Article at the First Defendant took any steps to verify the allegations made by Afsana.

Aside from the Claimant, there were multiple potential avenues of inquiry open to the First Defendant, the most obvious of which was to seek to obtain documents and information from the court proceedings to which reference was made. The allegations made by Afsana were not only untested, but they were also the subject of ongoing contested court proceedings in which, it was a reasonable assumption, the Claimant would have put his side of the story. The Independent Article presented Afsana's allegations to readers without offering any reason to doubt the credibility of her account.

173. As a result of the failure to carry out any verification and the failure to contact the Claimant, the Independent Article did not contain anything by way of rebuttal from the Claimant or include his version of events. That was a serious failure in basic journalist good practice and a breach of the Defendants' Code. This was not a case in which it could be concluded that the Claimant could have nothing valuable to contribute by way of response or answer. The only justification advanced for not contacting the Claimant was that he was not *the* (main) subject of the article. The Claimant was plainly *a* subject of the article and, in terms of likely reputational harm, likely to be the main casualty from its publication. Leaving aside the instruction in the Defendants' Code that it was important "*to abide not only by the letter but also [its] spirit*", the terms of the article squarely engaged the obligation to put the story to the Claimant. Beyond the argument that the Claimant was not *the* subject of the article, none of the First Defendants' witnesses suggested that there was any other justification for not complying with this "*good journalistic practice*".

174. Mr Price QC argued that "*none of the many reputable media outlets that reported the story in a similar manner to the Defendants thought it necessary to invite comment from the Claimant*". This was submitted in support of the contention that it was reasonable for the Defendants not to contact the Claimant or include his response in the articles. I reject this argument as entirely speculative. I have not considered other media publications in detail. I have received no submissions as to whether these articles bear a meaning defamatory of the Claimant, and I do not know the basis on which the other organisations considered they would defend their publications, if called upon to do so. They may have taken the view that they would defend any defamatory meaning as true, in which case the absence of approach to the Claimant and inclusion of his response was not a necessary part of the defence. More importantly, I must concentrate on the actual decisions made in this case by these Defendants.

175. On the evidence that I have, I would summarise the facts as follows. The First Defendant took a draft article, pitched by a practically unknown freelancer, Mr Sloan, and, without carrying out any (or any significant) checks on him or the contents of his article, published it 3 days later. None of the serious allegations against the Claimant that the article contained was put to him. Although the article did not name him, it identified the Claimant, which Mr Johnson (at least) recognised. None of those involved in the decision to publish considered that there was any need to put the allegations to the Claimant or to seek in any way to obtain and to include anything that the Claimant might want to say in rebuttal of his wife's allegations in the article. Judged objectively, that conclusion was seriously in error. The resulting article was, therefore, wholly one-sided and, inevitably, bore meanings that were seriously defamatory of the Claimant. I find it surprising that Mr Gore was unwilling to accept that the article was one-sided. It is beyond any sensible dispute that the Independent Article contained nothing to put in the balance against Afsana's allegations.

176. I reject Mr Price QC's argument that the Independent Article did not adopt Afsana's allegations. Beyond the language of "claims" and "allegations" (which were, in any event, not used consistently), there was nothing in the article to signal to a reader that there was any reason to doubt Afsana's account. In particular, Paragraphs [4], [7] and [8] were presented without any qualification. Together with the lack of any counterbalance, in the form of the Claimant's answer to the charge, and the generally sympathetic tone towards Afsana, the presentation was of an account that was both credible and truthful; the effect was adoption.

177. In my judgment, little if any allowance can be made for editorial judgment on the facts of this case. The First Defendant has not advanced its defence on the basis that a fine judgment had to be made about whether to include Afsana's allegations of domestic violence against the Claimant. The reality is that scant if any attention was paid to this aspect of the Independent Article. The fact that the Claimant was libelled by the Independent Article was not a product of a carefully reasoned editorial judgment; it was a mistake, as was the failure to approach him for comment. Those involved in the original decision to publish simply failed to recognise the Claimant as someone who was likely to suffer serious reputational damage as a result of publication of the Independent Article. Even allowing for hindsight bias, this is not a borderline case. The First Defendant has failed to demonstrate that a belief that publication of the Independent Article was in the public interest was reasonable. The First Defendant's s.4 defence in respect of the original publication of the Independent Article fails on this ground as well.

(b) Second Defendant

(i) Has the Second Defendant shown that the statements complained of were on the alleged matters of public interest described in Paragraph 8.1 of the Re-Amended Defence?

(ii) If it has, has the Second Defendant shown that those matters were (rightly to be regarded) as matters of public interest for the purposes of s.4(1)(a)?

178. Paragraph 8.1 of the Re-Amended Defence of the Second Defendant advanced the case in respect of s.4(1)(a) as follows:

> "There is a general public interest in the application of foreign law and law enforcement to British nationals in circumstances where different standards apply and more particularly to the application of Sharia and Emirati law enforcement to the divorce and custody arrangements in a case of a British woman married in England to a non- Muslim European man working in the UAE, where the man chooses to commence proceedings in the UAE governed by Sharia, such law discriminating against women and failing to provide due process, as compared with English and European family law, including in relation to allegations of domestic violence and abuse and the extent to which the British government ought actively to protect a woman in such a position."

179. For substantially the same reasons as set out in [162]-[164] above, I am satisfied that the Second Defendant has that the Standard Article was or formed part of a statement on a matter of public interest.

(iii) If it has, has the Second Defendant shown that it believes through either Charlotte Ross or Susannah Butter (or both) that publishing the statements complained of was in the public interest?

(iv) For this purpose, must Charlotte Ross and/or Susannah Butter be a person who took the decision to publish the statements complained of?

(v) If so, has the Second Defendant shown that either Charlotte Ross or Susannah Butter (or both) was such a person (or persons)?

180. As before, I will take these three issues together. The evidence clearly established that, subject to the overall supervision of the Editor, Ms Sands, Ms Ross had the final say as to whether the Standard Article was published and, if so, in what terms. Ms Butter is also responsible for the publication of the Standard Article. The Second Defendant has relied upon both Ms Ross and Ms Butter as having believed reasonably that publication of the Standard Article was in the public interest.

181. In her witness statement, dated 13 July 2020, Ms Ross said this about the decision to publish the Standard Article:

> "23. I believed that it was in the public interest to publish the Article on the basis of the information that we had and in the form that it was in. It was consistent with what I had envisaged when commissioning the article.
>
> 24. The absence of an attempt to contact Mr Lachaux, which would have been apparent to me from the Article, would not have raised a question mark in my mind as to the public interest in publishing it.
>
> 25. The public interest value of the Article related to the systemic failures in Dubai, which were illustrated by Mrs Lachaux's experiences. I had no reason to doubt the accuracy of the information in the Article relating to the court cases in Dubai. The allegations about the conduct of the Dubai police and the state of the refuge also appeared to be credible. It was relevant that the FCO had been involved in the case for three years and had not questioned the validity of any aspect of the family's account of Mrs Lachaux's experiences of the justice system in Dubai. In my experience the FCO would make you aware if a story is not what it seems to be.
>
> 26. The Article reported Mrs Lachaux's allegations of domestic violence. I did not believe that it was necessary or possible to prove that they were true, before reporting them. They were a necessary part of the story. The Article stated that Mr Lachaux denied them and they had not been tested in any court. I believed that they were sufficiently credible to be reported by The Standard in the context of the Article."

182. In her witness statement, also dated 13 July 2020, Ms Butter stated:

> "I do have a strong recollection of believing that our readers had the right to know how the Dubai system could treat a woman in Mrs Lachaux's position and that in telling that story the Article fulfilled an important public interest purpose."

183. For the reasons I have explained already, I am very sceptical that either Ms Ross or Ms Butter can have any actual recollection of the beliefs that they had over 6 years ago, as set out in their witness statements for trial. Nevertheless, they were not challenged about this by Ms Page QC, and their evidence was therefore not undermined in the same way as the evidence of Mr Green and Mr Johnson for the First Defendant. Although I am not bound simply to accept a witness's evidence in the absence of challenge by the opposing party, Ms Page QC's closing submissions did not contend that I should reject the evidence contained in the witness statements of Ms Ross and Ms Butter as to their beliefs as to the public interest when the Standard Article was published. In those circumstances, my conclusion is that the Second Defendant has demonstrated on the evidence that Ms Ross and Ms Butter both believed that publication of the Standard Article was in the public interest.

(vi) If so, has the Second Defendant shown that the belief was reasonable taking account of all the circumstances of the case?

184. The Standard Article contained seriously defamatory allegations against the Clamant. Although not named, he was readily identifiable. The ultimate source of the allegations was Afsana, but they were being relayed via Mr Yahiya. My findings in relation to the Independent Article, in [171] above, apply equally to the Standard Article. There was material available to Ms Butter which suggested that Mr Yahiya was exaggerating details of his mother's account and Ms Ross described Mr Yahiya as "*campaigning for her*". There was an obvious risk that both Afsana and Mr Yahiya were partisan.

185. It is clear on the evidence that Ms Butter was primarily responsible for researching the Standard Article and for the decisions as to who should be approached for comment. The Second Defendant's pleaded case was that "*it was not a necessary element of the [Second] Defendant's reasonable belief for the allegations [against the Claimant] to have been investigated or believed"*. Based on the evidence, I am satisfied that this was certainly not how Ms Butter approached her task, and rightly so. As set out above, she did take steps to investigate the allegations that were made by Mr Yahiya, and she made some attempts to probe the veracity of what he was claiming on behalf of his mother. In my judgment, however, her efforts, although genuine, were somewhat superficial and, ultimately, they were inadequate. In part, I consider that that was because the Standard Article was a feature article, not a news article. It was concentrating upon the plight of a British woman in the UAE told principally through an interview with her son. I accept that Ms Butter did consider Mr Yahiya's allegations to be credible, but her basis for concluding so was unreliable and she may well have reached a different conclusion (or at least had some reservations) if she had more carefully compared the account he gave in interview against the documents that he had provided. I do not attach significant weight to this factor as it is something which owes much to hindsight.

186. It is something of an oddity in this case that, very early on, Ms Butter had identified the need to put allegations made by Mr Yahiya to those whose conduct was potentially being criticised – the Foreign Office, Dubai Police and the Dubai prison – but she had initially omitted the Claimant from this category. She was not able to explain this and, judged objectively, it is a striking and inexplicable omission. The need to put the allegations to those who were potentially to be criticised was not only to ensure fairness to them, but also, as recognised by Ms Ross, to try and corroborate the allegations made by Mr Yahiya. If fairness required the unidentified police officers be given a chance to

respond to the allegations made against them, it was even more important that the Claimant, who was readily identifiable, should be given the same opportunity. Then, on the day of publication, Ms Butter suddenly did make urgent efforts to contact the Claimant. Perhaps, in haste, she overlooked that she had been provided with the Claimant's email address and so her efforts to contact him were less effective than they might have been because they had to be made via third parties.

187. I am unable to reach a firm conclusion as to what it was that led to this belated attempt to contact the Claimant. It very much looks like someone at the Second Defendant – possibly a lawyer – recognised that the Standard Article contained very seriously defamatory allegations against the Claimant, and he had not been approached for comment. It is not necessary to resolve this issue as the base facts are clear. Ms Butter tried to contact the Claimant to obtain his response. She did so because she clearly considered, albeit belatedly, that fairness required that he be given an opportunity to respond. She was not successful. The article was published without the Claimant being given a chance to respond. As with the Independent Article, the failure to put the allegations to the Claimant prior to publication was a clear breach of the Defendants' Code (see [25(iv)] above). The resulting article was almost entirely one-sided. The final sentence in [4] simply provided insufficient counterbalance to the detailed allegations contained in the rest of the article. Any ordinary reasonable reader was likely to regard this as a dishonest repudiation from a man who could evidently offer nothing beyond a bare denial in response to Afsana's apparently detailed allegations. In fact, it was incorrect to state in the article that the allegations were denied by the Claimant. He had said nothing because he had simply not been contacted.

188. The terms and tone of the Standard Article were wholly sympathetic to and supportive of Afsana. Mr Yahiya's allegations, made on her behalf, were adopted by the newspaper even to the extent of providing a link so that readers could sign a petition in her support; to an ordinary reasonable reader, the *Evening Standard* was clearly siding with Afsana.

189. As I have noted, the Standard Article was topical given Afsana's trial in the UAE was due to take place the following day. It was not suggested by Mr Price QC that this was a factor that justified publication of the article without having contacted the Claimant. The Second Defendant's position is, simply, that given the terms of the article and the public interest in the subject matter generally, there was no need to do so. I reject that. This was not the approach adopted by Ms Butter and she was correct to try to contact the Clamant to put the allegations to him and to give him an opportunity to respond. Basic fairness – and the Defendants' Code – required this to be done. No good reason has been provided for why he was not given this opportunity.

190. Fundamentally, I have no hesitation in finding that it was not in the public interest to publish the Standard Article, which contained allegations that were seriously defamatory of the Claimant, without having given him an opportunity to respond to them. The decision not to contact the Claimant was not a result of any careful editorial consideration, it was a mistake that was belatedly recognised, but not corrected, prior to publication. As to editorial judgment generally, my conclusions as set out in paragraph [177] apply equally to the Standard Article.

191. Overall, and taking into account all the circumstances including the general public interest in the subject matter of the Standard Article, the Second Defendant has failed to demonstrate that the belief of Ms Ross and Ms Butter that publication of the Standard

Article was in the public interest was reasonable. The important public interest in the subject matter generally of the Standard Article did not, on the facts of this case, reasonably justify the inclusion of the serious allegations against the Claimant (cf. Lord Hoffmann's observations in ***Jameel*** – see [130] above). The inclusion of allegations of domestic violence (*a fortiori* in such detail), without having contacted the Claimant for his response, with the resulting serious damage to the Claimant's reputation from their publication, was not justified by the public interest in the article generally; it was neither necessary nor proportionate. In consequence, the Second Defendant's s.4 defence in respect of the original publication of the Standard Article fails.

(2) Liability for continued publication online

192. As I have noted already, the two articles were subject to amendments in the online versions following publication (see [95] above). In the Defendants' opening submissions for trial, Mr Price QC included the following regarding defence of the continued publication of the articles (with footnotes omitted):

> "The Defendants' post-complaint amendments go beyond what the Court of Appeal and ECtHR regarded to be sufficient in the ***Loutchansky*** case. The public interest factors that justified the initial publication remain. They survive Mostyn J's rejection of AL's claim to be a victim of domestic abuse; a finding which is evident to any reader of the articles subsequent to his judgment. His observations on Emirati law were rejected by the Court of Appeal. More fundamentally from a s.4 perspective, the contrast between the outcomes in France and England illustrate the public interest in the subject matter and its contribution to a debate. Other factors that could reasonably be taken into account in favour of continuing publication have arisen since the initial publication and there is the general public interest in maintaining an archive.
>
> Further points available to Defendants are: (a) Warby J found that publication of the online article alone would not have satisfied the serious harm hurdle; and/or (b) following the amendments to the articles arising from Mostyn J's judgment the articles are incapable of bearing the pleaded meanings at any *Chase* level. The repetition rule was always subject to the overriding principle of bane and antidote. The reporting of Mostyn J's judgment in the articles and links to the news articles are plainly a sufficient antidote. The Claimant has accepted that the articles in their current form are materially different and threatened to issue fresh proceedings in relation to them, but has not done so or sought to amend the POCs.
>
> If the s.4 defence is rejected in relation to the print an initial online publication, the Court should uphold it from the time at which the articles were amended to include the points made by [the Claimant] in his letters of claim."

193. The reference to the outcome in France is to a decision by a Court in France refusing to recognise the Dubai divorce judgment. I was not taken to this judgment during the trial. The closing submissions, both written and oral, did not develop any further arguments, on the evidence, as to whether, if the s.4 defence was rejected for the original publication it should be upheld for some later phase of the online publication. Mr Price QC did, however, include in his written closing submissions a sentence saying: "*[The Defendants] do not repeat the submissions in their [Skeleton Argument] for trial and oral opening. The [Skeleton Argument] comprehensively sets out [the Defendants'] stance on the relevant legal principles and their application to the facts.*"

194. This is not a particularly helpful way of approaching litigation. It leaves it to me to work out, from the opening submissions, what argument the Defendants wished to advance, in the event that the s.4 defence failed for the original publication.

195. In these circumstances, I think I am justified in saying relatively little about this point. I certainly do not consider it to be my responsibility to perform the detailed analysis of potential arguments that could be raised about the applicability of the s.4 defence at various points of the continuing publication of the Articles when Mr Price QC has not advanced any such arguments in closing. I shall restrict my analysis to what I regard to be the two critical moments at which it might be thought reasonable for the Defendants actively to consider whether the relevant article should continue to be published and, if so, in what terms. The first point is following receipt of the letters of claim on 22/23 September 2014 (see [92]-[93] above) and then, subsequently, following Mostyn J's judgment handed down on 2 March 2017 (see [87] above).

(a) Continued publication after the letters of claim

196. The importance of the letters of claim, for any defence of public interest in respect of continuing publication of the articles, is that they contained the Claimant's factual response to the allegations published in the articles. At the time of original publication, the Defendants did not have the Claimant's answer to the charges made against him because the First and Second Defendant had, respectively, not sought or not obtained one.

197. The letters of claim set out a detailed response on behalf of the Claimant. Mr Gore accepted that it was a "*highly detailed rebuttal*". He did not suggest that the account given by the Claimant was inherently incredible, or that it was demonstrably contradicted by any evidence he had. Importantly, the Claimant's account raised, at least, very serious questions about the veracity of Afsana's claims, including her allegations of domestic violence. It suggested that she had committed breaches of court orders in the UAE, by abducting Louis and refusing to return him over a prolonged period, for which she was ultimately convicted on 13 February 2014. The letter to the Second Defendant provided details of a witness, said to be independent, who saw the alleged assault of Afsana in Al Safa Park, who supported the Claimant's account and whose evidence was said to have led the Dubai Public Prosecutor to dismiss Afsana's complaint of assault.

198. I have set out Mr Gore's evidence about the decision to continue publication of the articles following receipt of the Claimant's letters of claim (see [98] above). In my judgment, Mr Gore's evidence largely misses the point. The articles contained serious allegations of domestic abuse against the Claimant. Mr Gore was entitled to his belief that Afsana's case demonstrated flaws in her treatment in the UAE courts and to his view that she had been the victim of a "*discriminatory process*", but the challenge raised by the Claimant was to whether it was in the public interest to publish an article which presented a one-sided account by Afsana that she had suffered domestic abuse at his hands (as is implicitly recognised by Mr Gore in paragraph 12 of his witness statement). The amendments made following receipt of the letters of complaint demonstrate that Mr Gore had recognised that it was not in the public interest to continue publishing the articles without any modification, and he acknowledged that it was open to the Defendants to "update" the articles.

199. However, in the light of the detailed rebuttal of Afsana's claims in the letters of claim, the very limited amendment of the online articles is surprising. I accept Mr Gore's evidence that he believed that continued publication of the articles was in the public interest, but Mr Gore does not explain the changes that were made and the reasons for them. It is, of course, pre-eminently a matter for editorial judgment how to respond in such circumstances, and I should be careful not to descend into the role of editor, but I have reached the clear conclusion that the amendments were inadequate and insufficient.

200. The Defendants had a completely free hand as to what amendments they made to the articles, but they chose to leave the structure effectively unchanged. The body of each article remained, therefore, essentially one-sided. What was added, by way of balance, was added, really as a post-script, in a single paragraph. The effect of that presentation is likely to have a significant impact on the way that it strikes a reader. Although an ordinary reasonable reader will read and acknowledge the paragraph that was added to the end of the article, its impact is likely to be diminished, and not to be as effective as had the Claimant's response to allegations been presented alongside Afsana's allegations. Further, the Defendants condensed and summarised the Claimant's response to such an extent that it unjustifiably stripped away all the detail that he had provided. The detail of a denial is likely to be considered by an ordinary reasonable reader to be important to an assessment of its credibility. The result was an inequality of treatment in the presentation of allegation and denial.

201. In my judgment, following receipt of the Claimant's letters of claim, for any belief that continued publication of the articles was in the public interest to be reasonable, more substantial changes to the article were required, properly to reflect the Claimant's detailed rebuttal. Had the Claimant originally been approached for comment prior to publication, there would have been no justification for excluding so much of the detail that the Claimant had provided from any article that the Defendants published. Standing back, taking into account the original publication and all the circumstances as they stood following receipt of the letters of complaint, the Defendants have not demonstrated that Mr Gore's belief that continued publication of the articles was in the public interest was reasonable. The s.4 defence for the continued publication of the Articles following receipt of the letters of claim therefore fails.

(b) Continued publication after the Mostyn J judgment

202. The Defendants' response to the Mostyn J judgment is even more difficult to understand. Mr Gore appeared to me to be uncomfortable when being cross-examined about his belief that continued publication of the articles after the Mostyn J judgment – albeit with further amendments – was in the public interest. I consider that this discomfort was largely a result of the fact that Mr Gore is an intelligent person and he found it difficult to defend the position adopted by the Defendants.

203. Although the Claimant did not come out of it entirely unscathed, Mostyn J's judgment was a comprehensive demolition of Afsana's allegations following a trial in which both the Claimant and Afsana had given evidence, and the Judge, as apparent from the judgment, had fullest access to all relevant documents (unlike the Defendants). Decisions of the Court are not necessarily entitled to unqualified acceptance. In a democratic society, people may disagree with them. Mr Gore, however, eventually accepted in cross-examination that he did not challenge Mostyn J's factual findings in

relation to Afsana's complaints about the Claimant. Insofar as he had any quarrel with the Judge's conclusions, it appeared that this was limited to a disagreement with him as to whether the UAE legal system was discriminatory. The Defendants could have continued to publish their criticisms of the UAE system, based on Afsana's case, if they wished, but Mostyn J's judgment required a fundamental reassessment of whether it was in the public interest to continue to publish Afsana's allegations of domestic violence when these had been entirely rejected by the Court. The position might have been different if Mr Gore had believed, on a credible basis, that Mostyn J's judgment and findings were wrong. It is an important dimension of freedom of expression, in a democratic society, that individuals and newspapers are free to disagree with, or criticise, judgments of the court, but he did not suggest that he took issue with the Judge's decision in respect of Afsana's allegations. The issue under a s.4 defence is whether it was reasonable to believe that continued publication of Afsana's allegations of domestic violence (albeit with a paragraph referring to the Mostyn J judgment and findings added) was in the public interest following the judgment of Mostyn J. In my judgment, plainly it was not.

204. The approach adopted to reporting the Mostyn J judgment, in the context of the original articles, was to add a paragraph at the top of each article. Although a link was provided to a news report of the judgment, inexplicably no link to the judgment was provided. In my judgment, it was not reasonable to conclude that this was sufficient to justify continued publication of the original allegations as being in the public interest. An ordinary reasonable reader could be genuinely baffled at what s/he should make of this. Was the newspaper saying that, notwithstanding the judgment of Mostyn J, Afsana's allegations were still credible and worthy of belief? Was the newspaper suggesting that the Court was wrong?

205. In my judgment, without a substantial re-write, following the judgment of Mostyn J, defence of continued publication of the articles under s.4 was hopeless. My impression is that, by this stage, positions on the Defendants' side had become entrenched as a result of the litigation. It was always open to the Defendants – at any point after Mostyn J's judgment – to acknowledge that Afsana's allegations against the Claimant had been found to be false, but to maintain (and to publish) that she had nevertheless been poorly treated by the UAE authorities and badly let down by the British Government, if that is what they believed. In this claim, however, the question is whether the Defendants have established a s.4 defence for publication of the articles containing serious allegations of domestic violence after the decision of Mostyn J. In my judgment, they have not. Mr Gore's belief that continued publication of the articles as amended was in the public interest was not reasonable.

206. Finally, I should record that, even if Mr Price QC's argument based on ***Chesterton Global Ltd*** (see [144]-[148] above) were correct, it would make no difference to the outcome on the facts of this case. I have reached the clear conclusion that a belief that publication of the Independent Article and the Standard Article was in the public interest was not reasonable. This is not a case where the Court considers that the belief was reasonable, but for reasons different from those held by the relevant defendant.

H. Remedies

207. The parties agreed that, if liability is determined in favour of the Claimant, the issues then to be resolved are:

(1) Is the Claimant entitled to an award of aggravated damages as an element of the award of compensatory damages to which he is entitled?

(2) Whether he is or not, what is the quantum of general damages that the Claimant should be awarded by way of compensation?

(3) Is the Claimant entitled to a final injunction, and if so in what form?

(4) Is the Claimant entitled to relief under s12, Defamation Act 2013?

(1) Damages and aggravated damages

208. I will take issues (1) and (2), as identified by the parties, together. The separation of the issue of whether the Claimant is entitled to an award of aggravated damages from the general issue of damages is rather academic considering the principles which guide the award of damages generally. Nevertheless, the Defendants have argued that the Claimant is not, as a matter of principle, entitled to any award of aggravated damages, so I will have to resolve this point. I will, however, approach determination of these issues by considering, first, the principles that the Court applies when assessing damages in defamation actions before turning to the discrete question of whether the Claimant is entitled to any element of aggravated damages.

(a) Law

209. A successful libel claimant is entitled to recover, as general compensatory damages, such sum as will compensate him or her for the wrong he has suffered. The relevant principles were gathered by Warby J in ***Barron -v- Vines*** **[2016] EWHC 1226 (QB)**:

> [20] The general principles were reviewed and re-stated by the Court of Appeal in ***John -v- MGN Ltd*** **[1997] QB 586** … Sir Thomas Bingham MR summarised the key principles at pages 607—608 in the following words:
>
> > "The successful plaintiff in a defamation action is entitled to recover, as general compensatory damages, such sum as will compensate him for the wrong he has suffered. That sum must **[1]** compensate him for the damage to his reputation; **[2]** vindicate his good name; and **[3]** take account of the distress, hurt and humiliation which the defamatory publication has caused. In assessing the appropriate damages for injury to reputation the most important factor is **[a]** the gravity of the libel; the more closely it touches the plaintiff's personal integrity, professional reputation, honour, courage, loyalty and the core attributes of his personality, the more serious it is likely to be. **[b]** The extent of publication is also very relevant: a libel published to millions has a greater potential to cause damage than a libel published to a handful of people. **[c]** A successful plaintiff may properly look to an award of damages to vindicate his reputation: but the significance of this is much greater in a case where the defendant asserts the truth of the libel and refuses any retraction or apology than in a case where the defendant acknowledges the falsity of what was published and publicly expresses regret that the libellous publication took place. It is well established that **[d]** compensatory damages may and should compensate for additional injury caused to the plaintiff's feelings by the defendant's conduct of the action, as

> when he persists in an unfounded assertion that the publication was true, or refuses to apologise, or cross-examines the plaintiff in a wounding or insulting way. Although the plaintiff has been referred to as 'he' all this of course applies to women just as much as men."

[21] I have added the numbering in this passage, which identifies the three distinct functions performed by an award of damages for libel. I have added the lettering also to identify, for ease of reference, the factors listed by Sir Thomas Bingham. Some additional points may be made which are relevant in this case:

(1) The initial measure of damages is the amount that would restore the claimant to the position he would have enjoyed had he not been defamed: ***Steel and Morris -v- United Kingdom*** **(2004) 41 EHRR** [37], [45].

(2) The existence and scale of any harm to reputation may be established by evidence or inferred. Often, the process is one of inference, but evidence that tends to show that as a matter of fact a person was shunned, avoided, or taunted will be relevant. So may evidence that a person was treated as well or better by others after the libel than before it.

(3) The impact of a libel on a person's reputation can be affected by:

a) Their role in society. The libel of Esther Rantzen [***Rantzen -v- Mirror Group Newspapers (1986) Ltd*** **[1994] QB 670**] was more damaging because she was a prominent child protection campaigner.

b) The extent to which the publisher(s) of the defamatory imputation are authoritative and credible. The person making the allegations may be someone apparently well-placed to know the facts, or they may appear to be an unreliable source.

c) The identities of the publishees. Publication of a libel to family, friends or work colleagues may be more harmful and hurtful than if it is circulated amongst strangers. On the other hand, those close to a claimant may have knowledge or viewpoints that make them less likely to believe what is alleged.

d) The propensity of defamatory statements to percolate through underground channels and contaminate hidden springs, a problem made worse by the internet and social networking sites, particularly for claimants in the public eye: ***C -v- MGN Ltd*** (reported with ***Cairns -v- Modi*** at **[2013] 1 WLR 1051**) [27].

(4) It is often said that damages may be aggravated if the defendant acts maliciously. The harm for which compensation would be due in that event is injury to feelings.

(5) A person who has been libelled is compensated only for injury to the reputation they actually had at the time of publication. If it is shown that

the person already had a bad reputation in the relevant sector of their life, that will reduce the harm, and therefore moderate any damages. But it is not permissible to seek, in mitigation of damages, to prove specific acts of misconduct by the claimant, or rumours or reports to the effect that he has done the things alleged in the libel complained of: ***Scott -v- Sampson*** **(1882) QBD 491**, on which I will expand a little. Attempts to achieve this may aggravate damages, in line with factor (d) in Sir Thomas Bingham's list.

(6) Factors other than bad reputation that may moderate or mitigate damages, on some of which I will also elaborate below, include the following:

a) "*Directly relevant background context*" within the meaning of ***Burstein -v- Times Newspapers Ltd*** **[2001] 1 WLR 579** and subsequent authorities. This may qualify the rules at (5) above.

b) Publications by others to the same effect as the libel complained of if (but only if) the claimants have sued over these in another defamation claim, or if it is necessary to consider them in order to isolate the damage caused by the publication complained of.

c) An offer of amends pursuant to the Defamation Act 1996.

d) A reasoned judgment, though the impact of this will vary according to the facts and nature of the case.

(7) In arriving at a figure it is proper to have regard to (a) Jury awards approved by the Court of Appeal: ***Rantzen***, 694, ***John***, 612; (b) the scale of damages awarded in personal injury actions: ***John***, 615; (c) previous awards by a judge sitting without a jury: ***John***, 608.

(8) Any award needs to be no more than is justified by the legitimate aim of protecting reputation, necessary in a democratic society in pursuit of that aim, and proportionate to that need: ***Rantzen*** ... This limit is nowadays statutory, via the Human Rights Act 1998."

210. Where, as here, there are separate publications and the Defendants are not jointly liable for any individual publication, there must be separate awards in respect of each Defendant. The Court's task is to make a fair apportionment between the Defendants and to ensure that the overall award is proportionate to the entirety of the publications: ***Culla Park Ltd -v- Richards*** **[2007] EWHC 1850 (QB)** [23]-[24] *per* Eady J, and see also ***Hourani -v- Thomson*** **[2017] EWHC 432 (QB)** [238], [240] *per* Warby J.

211. Finally, as noted in [21(6)(b)] in ***Barron***, under s.12 Defamation Act 1952, a defendant is entitled to rely upon receipt of compensation by a claimant for libel "*in respect of the publication of words to the same effect as the words on which the action is founded…*".

(b) Evidence

212. The extent of publication of the articles is set out in [10]-[12] above. Measured against the original print publication, the online publication in England & Wales is tiny by comparison and almost *de minimis*. The meanings borne by each article are set out in

[13] above. The meanings were serious. Allegations of domestic violence and abuse are very serious and domestic abuse offences are regarded as particularly serious in the criminal justice system because they represent a violation of the trust and security that normally exists between people in an intimate or family relationship. Where proved in a criminal prosecution, domestic abuse will usually be a significant aggravating factor when the court considers sentence. The allegations made by Afsana also contained elements of controlling and coercive behaviour, which is now itself recognised as a separate criminal offence. Finally, the articles also alleged dishonesty on the part of the Claimant both to implicate Afsana in false charge of kidnapping and to deprive her of access to her son. On any view, these were grave allegations that went to the heart of the Claimant's personal integrity and fundamental attributes of his personality.

213. As noted above ([9] above), an article in similar terms to the articles published by the Defendants appeared in the *Huffington Post.* The meanings found to be conveyed in this article are set out in Warby J's judgment: [2016] QB 402 [91]-[92]. The publisher of the *Huffington Post* has paid £40,000 by way of damages to the Claimant in a settlement of his claim.

214. The Claimant's evidence relevant to the issue of damages is set out in his Fourth and Fifth Witness Statements, the latter of these being dated 26 February 2021 and provided after the completion of the evidence but before closing submissions. The Claimant's evidence was not challenged by the Defendants.

215. The Claimant has set out the impact on him of the articles and the proceedings in some detail. I have considered what he has said carefully. Some of it is not relevant to the assessment of damages. I will not take those parts into account, but I do not doubt the sincerity of the feelings that the Claimant expresses. Only the parts of the Claimant's evidence to which I refer will I take into account in the assessment of damages. What follows is necessarily a summary.

216. In terms of impact and damage to reputation of the articles, the Claimant states that he considered that the respective standing of the newspapers involved added weight to their allegations. He said that he regarded the Independent and Standard Articles "*as a severe blow to me in my dignity and in my capacity as a father and a husband, especially given all the efforts I had made over a period of years to be reunited physically and legally with Louis after Afsana disappeared with him.*" The Claimant speaks, in his witness statement, of his embarrassment and shame at his father telling him that the articles had brought their family name into disrepute, and his concern at his ability to form relationships given the allegations of domestic violence and controlling behaviour. He fears that Louis, now 11, or his friends will discover the articles online. He expressly requested in his witness statement – dated 14 July 2020 – that the Defendants should take down the articles. They did not do so.

217. As to the conduct of the proceedings, the Claimant stated in his evidence that he felt "*like a pawn in a game being played by the Defendants*". He added:

> "At times, it has felt as though they have taken a particular course in this case only because they have identified an opportunity to improve the law for the benefit of their newspapers and the UK media more generally. By dealing with things in this way, the Defendants have made me feel that I and my reputation and my feelings are of no consequence to them, and that I am just collateral damage on their road

> to further their newspapers' aims… At times during this period I felt vacant and emotionally unavailable to Louis – it is difficult for me to know that I will never get those years back."

218. Since the Defendants withdrew their defence of truth in December 2017 (see [15]), they have not contended that the meanings found by the Court are true. To an extent, the Claimant has already secured an element of vindication of these allegations through the judgment of Mostyn J. The Defendants have not, however, publicly withdrawn the allegations, accepted that they are false or apologised for them. In his witness statement, the Claimant states that he was very upset by the Defendants' refusal promptly to withdraw the defences of truth following Mostyn J's judgment. His solicitors had written, on 7 March 2017, asking for confirmation that the defences of truth would be withdrawn, but the Defendants declined to do so. On 15 March 2017, the Defendants' solicitors said:

> "Our clients were not party to the family proceedings, the truth defences contain imputations not complained of by your client which were either not addressed or partly upheld by Mostyn J, section 2(3) of the 2013 Act contains a further serious harm test in relation to truth that has not yet been the subject of judicial consideration, the present claims are stayed and a final determination of serious harm in our clients' favour would render any consideration of the truth defences otiose. In the circumstances, our clients do not propose to incur costs addressing (or debating) this issue until the final determination of serious harm."

I would note, here, that the Defendants took a different position in their closing submissions, contending that Mostyn J's judgment represented "*total vindication to which the Claimant was entitled in relation to the imputations of which he complains*". If that is what the Defendants believed – albeit Mr Gore's evidence might suggest this issue is not free from doubt – it would have been better for them to say so, unequivocally, and publicly, following Mostyn J's judgment.

219. In his Fifth witness statement, the Claimant said that he was "*profoundly upset*" by the experience of watching the Defendants' witnesses giving evidence during the trial. He states that the evidence of Mr Sloan and Mr Gore led to him breaking down in tears. He explained:

> "During the cross-examination of Mr Sloan, it became increasingly evident to me that in preparing his story, Mr Sloan had had no regard at all for me, my feelings, and the impact the publication of the article was likely to have on me. This was compounded by the knowledge that Mr Sloan was willing to cause huge damage to my reputation in return for just £96 (the sum apparently paid to him by *The Independent* for his contribution…). He seemingly considered that the allegations he was making against me were merely an incidental aspect of his story. This made me feel like I was just 'collateral damage' for him, something I found upsetting and which caused me spontaneously to cry.
>
> Similarly, Mr Gore's repeated refusal during cross-examination to acknowledge and accept the findings of Mr Justice Mostyn, when challenged about that matter, also upset me a great deal. I was astonished when Mr Gore said that he did not agree with Mr Justice Mostyn's findings, as though he were in a better position than him to judge the truth of the facts. It felt to me that if it had been up to Mr Gore alone, the Defendants would have persisted in their unfounded defences of truth,

since what the Court had determined didn't seem to matter to him. Also, the manner in which Mr Gore relentlessly attempted to justify his decision to continue publishing the articles on the Defendants' websites, even after my ex-wife's allegations had been found to be false, seriously upset me. Both these aspects of Mr Gore's evidence caused me to cry too."

(c) Submissions

220. Ms Page QC has submitted that the Court should award the Claimant very substantial general damages against each Defendant. The key factors relevant to the award, she contends, are the seriousness of the allegations and the extent of publication. She referred, by way of comparators, to the awards in ***Cairns -v- Modi*** **[2012] EWHC 756 (QB)** (upheld on appeal: **[2013] 1 WLR 1051**); ***Flood -v- Times Newspapers Ltd*** **[2013] EWHC 4075 (QB)**; ***Fentiman -v- Marsh*** **[2019] EWHC 2099 (QB)**; ***Turley -v- Unite the Union*** **[2019] EWHC 3547 (QB)**; ***Richard -v- BBC*** **[2019] Ch 169**; and ***Sicri -v- Associated Newspapers Ltd*** **[2021] 4 WLR 9**.

221. Ms Page QC accepts that the *Huffington Post* article was "*to some degree*" to the same effect as the articles in this action, but she has submitted that the defamatory meanings found in relation to the articles published by the Defendants in these proceedings were "*more extensive*" than those in the *Huffington Post* article. She has also contended that the *Huffington Post* does not have the standing and reputation of the two Defendants as publishers and that the overlap in readers is not likely to be similar.

222. Leaving aside the fact that I have no evidence of the relative standing of the publishers, or the extent of overlapping readership, s.12 does not require consideration of these points. s.12 is a statutory recognition of the principle that there should not be double-recovery and that, in cases of multiple libels, the Court can consider the full picture to ensure that the total sum that a claimant receives is not out of all proportion with libel awards generally. For example, it would be wrong in principle, for a claimant to bring 12 separate claims against individual local newspapers, with a combined readership of, say, ½ million, and to receive £100,000 from each of them, when a libel in a single newspaper with a readership of 5 million would, for a libel at the very top end of the level of seriousness, only be likely to lead to an award of damages of up to £350,000. s.12 enables the Court sensibly to calibrate awards of damages to ensure that total sum received is proportionate.

223. Where a defamatory article is published in several newspapers, it may be that there will be distinct harm caused to the reputation of the claimant in the eyes of the readership of each newspaper. If libel damages were awarded solely on that basis, then the impact of s.12 might be limited to demonstrating the extent of any overlap in readership. However, harm to reputation is only one part of the basis on which damages are calculated. The elements of vindication and solatium will require consideration of other matters. In respect of hurt feelings, it would be unreal for a claimant to suggest that s/he can neatly partition the hurt caused by the publication of different articles to the same defamatory effect.

224. I am satisfied that the *Huffington Post* article contained allegations to the same effect as published by the Defendants in the articles for which they are responsible. In fixing the sum of damages, I shall pay proper regard to the fact that the Claimant has already received £40,000 for similar allegations. Part of this sum will have been compensation

for the Claimant's hurt and distress. The Defendants are entitled to rely upon this in mitigation of the damages that will be awarded in this claim. I will reflect this in the award that I make.

225. Mr Price QC submits that the Claimant is not entitled to aggravated damages because he accepts that the Defendants have acted in good faith. He contends that this is "fatal" to any claim for aggravated damages, relying upon ***Garcia -v- Associated Newspapers Ltd*** **[2014] EWHC 3137 (QB)** [302]. Mr Price QC has also contended that there was an omission to put the majority of the case in relation to aggravated damages to the Defendants' witnesses.

(d) Decision

226. The starting point is that damages are awarded in defamation actions, whether aggravated or not, are compensation; they are not punishment. ***Garcia*** establishes that the sum by way of compensation cannot *simply* be increased because a defendant has advanced a defence to a defamation claim: see also ***Sloutsker -v- Romanova*** **[2015] EMLR 27** [81(i)]. As a matter of principle, that is clearly correct, but the approach is more nuanced.

227. In my judgment separating out a specific award for "aggravated damages" is unnecessary and, I consider, generally unwise. The Court's task is to assess the proper level of compensation, taking into account all the relevant factors, which include any elements of aggravation. If, as the authorities recognise, the assessment of libel damages can never be mechanical or scientific, attributing a specific figure to something as nebulous as "aggravation" has an unconvincing foundation. Worse, as it would represent the imposition of a clearly identified additional sum of money, it risks the appearance of being directly attributed to the conduct of the defendant. That comes perilously close to looking like a penalty. For these reasons, I consider the better course is to fix a single award which, faithful to the principles by which damages in defamation are assessed, is solely to compensate the Claimant. The award can properly reflect any additional hurt and distress caused to the Claimant by the conduct of the Defendants. To speak in terms of whether a claimant is "entitled" to an award of aggravated damages is misleading. Every claimant who succeeds in a claim for defamation is "entitled" to an award of damages which may reflect any proved elements of aggravation. The real question is whether the claimant can demonstrate, by admissible evidence which the court accepts, that the damage to his/her reputation and/or his/her distress or upset has been increased by conduct of the defendant.

228. I reject Mr Price QC's submission that the elements of aggravation relied upon by the Claimant needed to be put to the Defendants' witnesses. On the issues as they arise in this case, the Defendants' witnesses did not have any relevant evidence to give. The Claimant was not challenged as to the matters he has identified as having added to the hurt and distress he has felt. The only issue, therefore, is whether his reaction is a reasonable one and is capable of aggravating the award. Mr Price QC has not suggested that the Claimant's evidence as to his feelings about the way in which the proceedings have been conducted by the Defendants, including at trial, were unreasonable.

229. There is a danger of this issue becoming disproportionate to its overall importance. Given the undoubted seriousness of the libel and the extent of publication, the impact of the element of aggravation on the sum I shall award in damages will be relatively

small. As a matter of principle, however, I am satisfied that the Claimant is entitled to have the award of damages reflect the following elements of aggravation. First, I am satisfied that the Claimant is justified in feeling that there has been an element of high-handedness in the Defendants' treatment of him. Specifically, the delay in withdrawal of the defence of truth which has understandably upset the Claimant. I can also understand the Claimant's complaint about feeling like a pawn in a game. For example, looked at from the Claimant's perspective, it is not difficult to see why the letter of 15 March 2017, explaining the Defendants' reasons why they were not withdrawing the defence of truth, upset him and contributed to this feeling. It relegated the matter of most importance to the Claimant – the truth or falsity of the allegations – to a point of insignificance that did not justify any further discussion or costs. Equally, I have no difficulty in accepting as genuine the Claimant's feelings at hearing those parts of Mr Gore's evidence during cross-examination dealing with the Defendants' response to Mostyn J's judgment. The Claimant is justified in feeling that there has been a significant element of stubbornness and intransigence in the Defendants' approach to him in the litigation. He has been thwarted in his efforts to obtain the vindication that he has ultimately been successful in achieving. This is rightly to be taken into account – even if the impact is limited – in the proper assessment of the award of damages.

230. I should state clearly, a defendant is perfectly entitled to defend litigation in all proper ways available to it. No defendant will be 'punished' for the manner in which it legitimately defends a civil claim. However, in defamation claims, a defendant must have an eye to the impact that this may have on a claimant if, ultimately, any question of damages arises. It is clearly established that the Court will take into account the impact on the claimant's feelings when assessing the sum to be awarded in damages. This is legitimate compensation, not impermissible punishment.

231. Where a defendant is advancing a bona fide defence to the claim, the failure to apologise or publicly to acknowledge the falsity of the allegations may not be an aggravating factor, but it depends upon the circumstances. Here, the refusal to acknowledge the falsity of the allegations following the decision of Mostyn J (*a fortiori* after the Court of Appeal had dismissed the appeal against his decision) is a matter that has understandably upset and frustrated the Claimant. Upon withdrawing their truth defences, it would have been perfectly possible for the Defendants to maintain their public interest defences whilst at the same time publicly acknowledging the falsity of the claims. Undoubtedly, a failure to acknowledge the falsity of seriously defamatory allegations and/or the failure to apologise deprives a defendant of what would otherwise be significant mitigation. It also means that the element of vindication can only be provided by the award of damages and the Court's judgment.

232. I will make separate awards in respect of each Defendant, but I will reduce each award from the sum that would otherwise have been appropriate had either defendant been sued alone to ensure that the overall award is proportionate.

233. Taking all these matters into account, I will award the Claimant £50,000 against the First Defendant and £70,000 against the Second Defendant. The difference in the award between the two Defendants principally reflects the greater extent of publication for which the Second Defendant was responsible.

234. Following receipt of the draft judgment, the Claimant asked me to apportion the damages awarded against the First Defendant as between the publication (in print and

online) in *The Independent* and the publication in the *i* newspaper. This was because separate claims had been issued in respect of these two articles. The First Defendant indicated that it was content for this to be done. I will do so, calculated on the extent of the respective publications (as the meanings the articles bear are the same – see [13(1)] above). I therefore apportion the sum of £11,500 in respect of the publication of *The Independent* article (in print and online) and £38,500 in respect of the publication of the *i* article. I should make clear that the figure of £11,500 is an arithmetical apportionment of a sum that already itself reflects the award against the Second Defendant and the sum recovered by the Claimant in respect of the *Huffington Post* article. Had proceedings been brought solely in relation to the article published in *The Independent*, the assessment of damages would have led to a significantly greater award.

235. By way of cross-check, this will mean that the Claimant will have received a total compensation in respect of the Independent and Standard Articles, and the *Huffington Post,* of £160,000. Having regard to the seriousness of the allegations, the extent of publication and the purposes of an award of damages in libel proceedings, I am satisfied that this is a just and proportionate sum for the Claimant to receive by way of compensation.

(2) Injunction

236. Mr Price QC did not address the issue of injunction in his closing submissions, but in the Defendants' skeleton argument for trial, he argued:

> "There are a number of overlapping reasons why no injunction should be granted: (a) there is no prospect of Ds publishing a statement which conveys the imputations complained of in the POCs; (b) the articles in their current form do not [after the amendments following the Mostyn J judgment] ; (c) continuing publication is not likely to cause serious harm; (d) there remains widespread reporting of the imputations complained of in media articles and elsewhere; (e) continuing publication is protected by the s.4 defence in any event… and/or (f) an injunction which has the effect of compelling Ds to excise any reference to parts of the article relating to the imputations complained of is not a 'necessary restriction' of Ds' Article 10 right. They are a necessary part of the articles and to remove them would strip them of meaning and accuracy. In ***Times Newspapers Ltd -v- United Kingdom*** **[2009] EMLR 14** a significant factor in the court's rejection of the applicant's case was that Court of Appeal merely required the addition of a qualification, not the removal of the article altogether."

237. As is usually the position, the issue of the terms of any injunction is better dealt with once the parties have considered the Court's judgment. Indeed, when they have done so, it is often the case that agreement is reached as to the terms of an undertaking to be given to the Court regarding further publication. Nevertheless, I should state my decision on the issues of principle raised by Mr Price QC.

238. On the evidence, the Claimant has established that, unless an injunction is granted, the Defendants will continue to publish the articles. I have rejected the only defence advanced by the Defendants to defend the continuing online publication of the articles. Prima facie, therefore, the Claimant is entitled to ask the Court to impose an injunction. Even if it is correct that there is "*widespread reporting*" of the same or similar

allegations (and Mr Price QC did not take me to any of the 45 reports included in the trial bundles said to demonstrate this, referring to them only in a footnote), that would not be determinative of whether the Court should grant an injunction, following trial, against these Defendants. It may be that a responsible publisher, reflecting upon this judgment and that of Mostyn J, might well conclude that it should consider whether it was appropriate to continue publishing an article that made similar allegations against the Claimant.

239. The decision whether to grant an injunction is discretionary, but I consider that the factors weigh heavily in favour of granting an injunction. It is the natural remedy that flows from the Court's decision, and, in the absence of a satisfactory undertaking, it is necessary to prevent further publication. The terms of any injunction can be tailored to ensure that they are proportionate. The argument that the terms of the injunction should not extend to a *Chase* level 2/3 variation of the meanings found in respect of the original publications is tenable. However, against that, the Defendants have never sought to raise a truth defence to a *Chase* level 2 meaning in respect of the articles as published since amendment following the Mostyn J judgment. Arguably, if they were going to do so, they should have done it in the context of these proceedings. In turn, the Defendants have argued that it was for the Claimant to bring a further claim in respect of the amended articles either by fresh action or by amendment to the existing claim (see [192] above).

240. Subject to further submissions, I am minded to grant an injunction (1) requiring removal of the Independent and Standard Articles in their current from the respective websites; and (2) prohibiting the Defendants from publishing any further words that bear the meanings found by the Court in respect of those articles or substantially the same meanings. If the Defendants consider that they can publish a fresh article that does not convey those meanings found by the Court in respect of the original publications, then they will be free to do so in exercise of their right to freedom of expression. Alternatively, the Defendants may take the view that, after over 6 years of litigation, enough is enough. Ultimately, that will be for them to decide editorially and legally.

241. There was a suggestion in Ms Page QC's opening submissions that the First Defendant is no longer the operator of *The Independent* website. I have no evidence about this, and the point was not answered or addressed by Mr Price QC in his submissions. If it is correct, then Ms Page QC has indicated she will seek an order, under s.13 Defamation Act 2013, directed at the current entity responsible for the continued publication of the Independent Article. In principle, and subject to further submissions, I would be minded to grant such an order if the First Defendant is not the current operator of *The Independent* website. If necessary, I shall hear further submissions on this point following hand-down of the judgment.

(3) Publication of a summary of the Court's decision

242. s.12 Defamation Act 2013 provides:

> "(1) Where a court gives judgment for the claimant in an action for defamation the court may order the defendant to publish a summary of the judgment.
>
> (2) The wording of any summary and the time, manner, form and place of its publication are to be for the parties to agree.

(3) If the parties cannot agree on the wording, the wording is to be settled by the court.

(4) If the parties cannot agree on the time, manner, form or place of publication, the court may give such directions as to those matters as it considers reasonable and practicable in the circumstances.

(5) This section does not apply where the court gives judgment for the claimant under section 8(3) of the Defamation Act 1996 (summary disposal of claims).

243. An order under s.12 is discretionary. The principles are set out in ***Monir -v- Wood* [2018] EWHC 3525 (QB)** [239]-[242] and ***Turley*** [188]. Ms Page QC submits that, applying these principles, the Court should order publication of a summary of the judgment. She argues that both Defendants are media publishers who have the means to publish such a summary and that this would be likely to be an effective way of promoting the Claimant's vindication. Mr Price QC has not advanced any arguments for the Defendants in respect of the claim for an order under s.12.

244. I am satisfied that this is an appropriate case in which to make an order under s.12. Although it is over 7 years since the original publication of the articles, the continued publication since then means that there remains a realistic basis on which to conclude that the published summary will come to the attention of at least some of those who read the original libel and others who may have learned about the allegation via the 'grapevine' effect. Neither Defendant has already published a retraction or apology. For the reasons I have explained, the substantive amendments that have been made to the articles since original publication have not adequately drawn the sting of the allegations. In short, there is a real purpose to be served by making an order under s.12.

245. I will invite the parties to attempt to agree the terms of the order to be made. I will resolve any outstanding dispute when the judgment is handed down.

Appendix 1: The articles complained of, as originally published

(A) The Independent Article

Family of Afsana Lachaux claim UK is unwilling to help for fear of risking jet deal.

[1] The family of a British woman trapped in the United Arab Emirates and facing charges of kidnapping her young son have accused the UK authorities of abandoning her.

[2] Afsana Lachaux, 46, from Poplar, east London, was a British civil servant when she met a wealthy French currency dealer who she married in 2010. The couple moved to Dubai where she gave birth to their son, Louis.

[3] Four months later, the family claim, her husband became violent. They also claim he hid Louis's French passport, and refused to allow him to be registered as a British citizen. Fearing for her own safety, they say, Ms Lachaux escaped, taking Louis with her.

[4] She tried to return to the UK, but her husband secured a travel ban from a Dubai court and requested that her passport be confiscated. He also initiated divorce proceedings and won custody of Louis.

[5] Mrs Lachaux turned to the UK consulate for help. At first, says her son Rabbhi Yahiya, 26, officials referred her to a refuge for victims of domestic violence. But, he added, they didn't realise the refuge was legally bound to notify her husband once she checked in.

[6] Mrs Lachaux was forced on the run again. She again contacted the consulate and was advised to go to the police station to face charges of libel her ex-husband had brought.

[7] There she was physically assaulted by a police officer, her son claims, and Louis was denied food and water.

[8] Then in October, when his mother was meeting a friend, her ex-husband snatched Louis from her arms. She has not seen him since.

[9] Ms Lachaux's ex-husband filed a further case against her for kidnapping, and if found guilty, she could face several years in prison.

[10] Mr Yahiya says he has written several letters to the Foreign Office to no avail. 'As a family, we are disgusted with the way they have handled my mother's case,' he said.

[11] In the past year, Prime Minister David Cameron and Foreign Secretary William Hague, have made official trips to Dubai in a bid to secure a lucrative sale of Eurofighter Typhoon military jets.

[12] 'Most of our calls were never returned. They don't want to jeopardise the sale,' claimed Mr Yahiya.

[13] Rori Donaghy, director of Emirates Centre for Human Rights, added: 'The British government have failed to support Afsana, because they were seduced by the deal.' Meanwhile Nick McGeehan, Middle East Director for Human Rights Watch, said the 'UAE's laws discriminate against women', meaning 'Mrs Lachaux cannot be guaranteed a fair trial.'

[14] Mrs Lachaux's MP, Labour's Jim Fitzpatrick, told The Independent: 'The way Afsana Lachaux has been treated is appalling. As a woman in a Muslim country the authorities there have taken the word of the man as true.'

[15] A Foreign Office spokesperson said: 'We cannot interfere in the judicial process of another country. We will continue to provide consular assistance to the family'.

(B) The Standard Article

Tomorrow a London mother goes to court accused of abducting her own three-year-old. Her older son tells Susannah Butter how escaping a troubled marriage left Afsana Lachaux facing jail abroad after her ex-husband 'snatched' their child

[1] Tomorrow, in a Dubai courtroom, more than 4,000 miles away from her home, a jury will decide if Afsana Lachaux is guilty of kidnapping her three-year-old son Louis from her ex-husband.

[2] The 46-year-old former civil servant from Poplar may never see her child again. Her older son from a previous marriage, Rabbhi Yahiya, 26, says: 'Unless the British Government intervenes, my mum risks going to jail for something she didn't do, after which she will be deported and lose her son. All she did was leave an abuser.'

[3] Despite being accused of kidnapping, Lachaux hasn't seen her three-year-old since October last year, when her husband allegedly took him out of his pushchair in the street. The case has cost the family a 'debilitating'£70,000 in legal fees and left 'an overriding feeling of helplessness'.

[4] The exact charges relate to Lachaux not bringing her son to a custody visit with her ex-husband, who cannot be named for legal reasons, in March 2012. But Yahiya, who works for the British Council, gives his mother's version of events. 'She didn't turn up because on previous visits she was assaulted by him in public. She told the police but they didn't want to hear it.' The allegations of domestic violence have not been tested in any court, and her ex-husband has denied them.

[5] Lachaux is originally Bangladeshi but grew up in east London, where she married and brought up Rabbhi, 26, and his 23-year-old brother. 'She rose up the civil service from local government and worked in regeneration. She was a successful, sociable, headstrong woman. I am proud of her. We liked going to Greenwich as a family.' She and Yahiya's father are divorced.

[6] In 2009 Lachaux told her children she was seeing a French man, a comfortably off avionics engineer based in Dubai. Yahiya says: 'I never asked where they met. We were glad my mum had found someone and was happy.'

[7] They married in summer 2009 in London and moved to Dubai in February 2010. 'It was a big adventure – the first time my mum had lived abroad. They were in love and planning to have a child so she was excited. Now I remember that he seemed reserved and only his brother and parents came to the wedding but at the time I didn't question it. It was a happy time.'

[8] Louis was born two months premature, in April 2010, and shortly afterwards Yahiya stopped hearing from his mother as frequently. 'We thought it was odd that she hadn't brought Louis to see us. In November we Skyped.'

[9] He recounts what he heard that day. 'She told me he had beaten her and showed me the bruises. She was crying, which I'd never seen her do before. She told me that since Louis was born her husband had become controlling. He refused to let her register Louis as a British citizen, got him a French passport and hid it with his birth certificate outside the house. The impression I got was that he didn't want her to take Louis anywhere without him. A woman can't work in the United Arab Emirates without her husband's permission so she was confined to the house. Eventually she told the police but they just said, "Go home to your husband". It's seen as the man's right to chastise his spouse there.'

[10] A year later, Yahiya persuaded her to escape. 'I went to Dubai in April 2011. We fled but couldn't leave the country because we didn't have Louis's passport.' They stayed in hotels and rented apartments but, according to Yahiya, things got worse. 'In June 2011 she was taken to Bur Dubai police station for 'absconding'. She and Louis were put in the same cell where a British man had allegedly been beaten to death by guards a month earlier.'

[11] Yahiya says she was locked up for four hours in 40-degree heat and denied food and water. 'While she was holding her one-year-old and asking why she was there, a prison guard pushed her in the face.' Although Lachaux had never been charged with any offences, her passport was confiscated by Dubai police.

[12] Her husband obtained visiting rights to see Louis, so every week Lachaux would meet him in the park. According to what his mother told Yahiya: 'Once he tried to snatch Louis and it badly bruised his head,' Yahiya alleges. 'She went to the police but they said they didn't care if she lived or died.'

[13] She went to the Dubai Foundation for Women and Children in February 2012. 'It's the only refuge in Dubai and they had a legal obligation to tell her husband where she was. She and Louis shared bunks with illegally trafficked sex workers.'

[14] In March 2012 she went into hiding and stopped the visits – it is for this that she is being prosecuted. 'I told her not to go any more. I was concerned for her.' Yahiya and his brother received an email from her husband, warning that if they went to Dubai he would report them for aiding a kidnap. She lived on the sofas of friends and 'in squalid accommodation, living off noodles' with Louis who, his brother says, is 'sharp and funny'.

[15] And then, on October 29 last year, her husband tracked her down. 'Dubai's a small place. She told me he took Louis – it happened in an instant.' Lachaux hasn't seen her son since.

[16] When she called the British Embassy to report the incident they told her that in August 2012 her husband had obtained a divorce in a Sharia court and been given custody. 'My mum didn't even know. Men can do that in Dubai. She was denied custody on claims that Louis had eczema, making her an "unfit mother".' She claimed to Yahiya that she did not know the four witnesses who testified against her.

[17] Since this began, Lachaux's family have been trying to help but the Dubai justice system has proved impenetrable. 'For three years I have been in touch with the Dubai Embassy, the British Embassy there, William Hague and the Middle East ministers. I've told them about every incident but they say they can't intervene in the judicial process of another

country. Our MP Jim Fitzpatrick has been supportive, and asked David Cameron to raise my mum's case when he's been there. I've read about an Austrian woman and a Norwegian woman being raped there, and both their governments intervened. Why can't ours do anything to help my mum? Do you understand the frustration?'

[18] The Standard contacted the Dubai police for a response, and was referred to the British Consulate in the UAE. The FCO spokesman said: 'Consular staff have been providing assistance to Mrs Lachaux since 2011 including attending court hearings with her. Consular officials have approached the UAE authorities about this case and we will continue to work closely with them. However we cannot interfere in the judicial process of another country. We must respect their systems just as we expect them to respect the UK's legal processes.'

[19] Meanwhile, Yahiya awaits the court case. 'Every time I speak to my mum I try to keep her spirits up. She's still strong but her face has changed. She's so skinny and on tenterhooks the whole time. My family and I would like the British authorities to ask the Dubai government to drop her case, overturn the current custody order and return her passport so that she and her son can come home to London'.

[20] Petition to free Afsana Lachaux at [website addresses given]

Appendix 2 – Extracts from the cross-examination of Mr Gore

Q. Now, the next milestone is the judgment of Mr Justice Mostyn on 2 March 2017 in the English High Court family proceedings; did you read it when it came out?

A. I did, yeah.

Q. Did you accept his findings?

A. I was -- I was surprised about the findings in some respects.

Q. That's not my question: did you accept his findings?

A. I didn't accept them on the principle that there seemed to be no discrimination in the use of the local UAE laws. That didn't seem to me to be the case.

Q. Will you go, please, to … one paragraph of Mr Justice Mostyn's judgment, which you read…. Have you got paragraph 122?

A. Yes. I have got that.

Q. You'll see he says:

> "I revert to the findings sought by the mother set out at para 9 above. As will by now be apparent I reject the majority of the mother's case. I do not accept that she was a victim of abuse, threats and violence from the father, although I do accept that the relationship was stormy and that in the course of frequent arguments each hurled accusatory insults at the other."

Did you accept his finding that she was not a victim of abuse, threats and violence from the father?

A. Well, I -- I mean -- I mean, that puts me in a difficult position because I want to be respectful of the judgment. But I was -- I was very surprised that that was asserted as clearly as it was. But I'm not sure I agreed with it, but I guess I accept it.

Q. He conducted a trial according to English fair trial procedures in which both parties were represented by leading counsel and both parties were cross-examined. That's correct, isn't it?

A. Yes.

Q. That's how we do things in this country?

A. Yes, absolutely.

Q. He says:

> "I do not accept that she was fearful of him."

Do you accept that? Did you accept that finding?

A. Well, again, I was surprised by it, but yeah, I accept it.

Q. Did you think you knew better than he?

A. No, that's not what I'm saying at all.

Q. He says:

> "I do not accept that her complaints were not investigated or taken seriously by the police and the court. I do not accept that she was mistreated by the police."

Do you say you know better than that?

A. No, I don't say I know better than that.

Q. "I emphatically do not accept that she lived in hiding as she was fearful of the father and the authorities." You don't know any better than that -- you didn't know any better than that, did you?

A. No, that's not what I'm saying at all.

Q. "She went underground to prevent the father seeing his child and because she feared she would lose the case brought by him." Do you accept that? Did you accept that, I should say?

A. Yes, I mean, I think that's the case…

Q. "I do not accept that she was trapped in Dubai as a result of travel bans or confiscation of her passport. After she was found she was able to leave without let or hindrance." Were you in any position to think you knew better than Mr Justice Mostyn?

A. No. I accept that once she was able to leave -- sorry, after she had been found and her passport had been returned, that that was technically the case. Whether she felt that way given her desire to be close to Louis I think is a slightly different matter, but yes, okay, I accept that.

Q. He goes on: "I do not accept that she did not have notice of the divorce proceedings or the opportunity to participate in them. She did participate in them and filed an extensive defence and counterclaim." Now, he must have had documentation to support that, mustn't he?

A. Yes, I mean, I don't dispute at all that she participated in them up to a point. I think that to what extent she did is clearly a matter of interpretation and certainly towards the end of those proceedings she did not participate in them whatsoever.

Q. Well, this was not, he had found, because she didn't have notice of them: "I do not accept that she did not have adequate representation and did not have the means to secure adequate representation. I do not accept that the proceedings were unfair. The ground for divorce used in this case is virtually identical to our most commonly used one (unreasonable behaviour), and the custody laws are best interests based. The mother was not divorced on traditional Islamic grounds and sharia judges did not steal her son." Now that, as I say, came out on 2 March 2017. Why did you take until 13 December 2017 to remove from the public record in these proceedings the defences of truth?

A. I think our view was several points. First of all, it appeared to be the case that Afsana Lachaux was planning to appeal the decision of Mr Justice Mostyn; secondly, the IPL/ESL appeal in the serious harm case had yet to be heard I think at the Supreme Court; and given all of that, it seemed to me that our course of action in reporting the outcome of this family hearing, adding addendums to the original articles was the most appropriate course of action and, as you say, we didn't remove or recant the truth defence until a later date.

Q. No, no, you stood by the defence, didn't you, until December 2017 at least so far as Mr Lachaux was concerned? He was still facing that defence for months after Mr Justice Mostyn's judgment.

A. Yes, I understand that's the case, yes.

Q. You realise, don't you, and would have realised, would you not, how much hurt and distress that would have caused to him?

A. I'm sure that he -- perhaps was upset by this. I wouldn't want to, you know, make assertions as to his feelings or otherwise.

Q. Well, it would have been perfectly obvious to you at the time, wouldn't it, that this would have been deeply distressing to him?

A. The ongoing existence of the truth defence being on the record?

Q. Yes.

A. I'm -- I think it's very hard for me to put myself in his position, but whether a legal document may have remained on the record or not, on the face it, didn't seem to me to be wildly distressing, but I accept that if that's his case, then …